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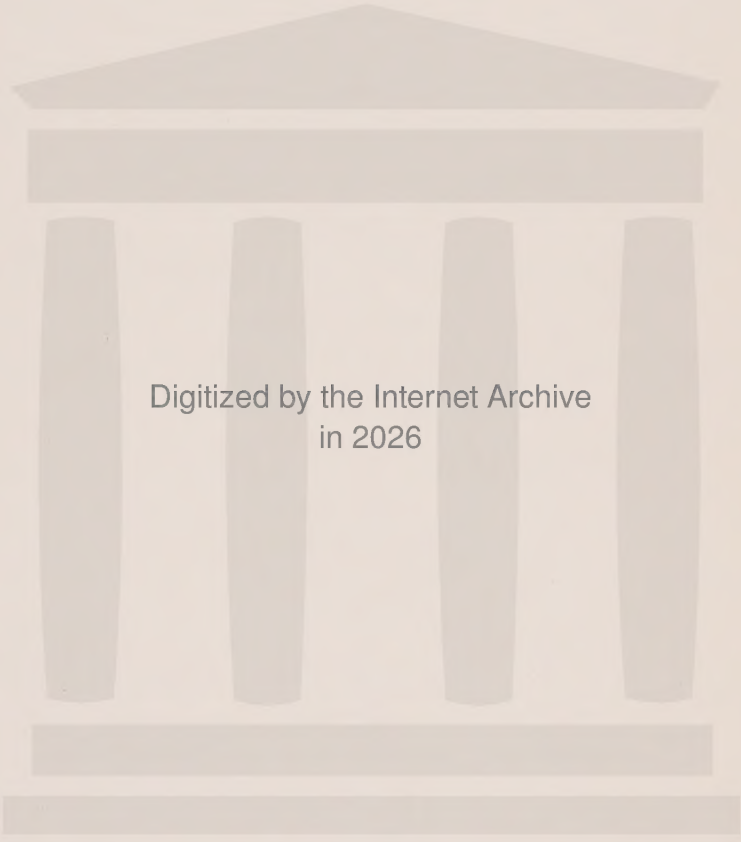
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1894.

THE

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QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1893. 1894.

[IN THE COURT OF APPEAL.]

C. A. 1893 *Oct.* 27.

IN RE BEAUCHAMP BROTHERS. EX PARTE G. W. BEAUCHAMP.

Bankruptcy—Act of Bankruptcy—Bankruptcy Notice—Receiving Order—Partnership Firm—Infant Partner—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 5, 9, 110, 115—*Bankruptcy Rules*, 1886, *rr.* 260, 262, 264.

The Bankruptcy Act, 1883, and the general rules made pursuant to the Act, do not authorize the making of a receiving order against a partnership firm of which one of the partners is an infant.

APPEAL by Gilbert Walter Beauchamp, an infant, against a receiving order made by one of the bankruptcy registrars against a partnership firm of Beauchamp Brothers, of which the appellant was a member. The other partner was of full age.

The order was made upon a bankruptcy petition which was presented by Messrs. Lovell & Christmas, who were judgment

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creditors of the firm, by virtue of a final judgment for 369*l.* 14*s.* 2*d.*, which had been obtained by them on August 2, 1893, in an action in the Queen's Bench Division against the firm in the firm name. On the same day the creditors served a bankruptcy notice in respect of the judgment debt upon the firm, by serving it at the principal place of business of the firm to the person then having the control or management of the business there. The notice was not complied with within the time limited for the purpose. A bankruptcy petition against the firm was then presented, founded upon the judgment debt, and an allegation that an act of bankruptcy had been committed by the firm by their failure to comply with the bankruptcy notice. The petition was served in the same way as the notice.

The infant partner appealed against the receiving order made on this petition. He had not held himself out as being of full age.

Sir H. James, Q.C., *H. Reed, Q.C.*, and *A. Powell*, for the appellant. The receiving order is invalid altogether. By s. 5 (1) of

(1) By s. 4: "(1.) A debtor commits an act of bankruptcy" (inter alia) (*g*) "If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

Sect. 5: "Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate."

By s. 9: "(1.) On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor."

Sect. 110: "Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others."

Sect. 115: "Any two or more persons, being partners, or any person

the Bankruptcy Act, 1883, a receiving order can only be made against a debtor who has committed an act of bankruptcy, and it is to be made on the petition of a creditor or of the debtor himself. An infant cannot owe a debt, except for necessaries; he cannot commit an act of bankruptcy, and an adjudication of bankruptcy cannot be made against him, when he has not held himself out to be of full age: *Ex parte Jones.* (1) The mere carrying on business by an infant is not such a holding out. There is no distinction for this purpose between an adjudication and a receiving order. Sect. 115 deals only with procedure against partners; it does not enable an adjudication to be made against an infant partner. By s. 110 a petition could be presented against the adult partner alone. As between the infant and the other partner the assets of the firm are liable to pay the debt of the firm, but there is no remedy against the infant personally: Lindley on Partnership, 5th ed. p. 74. By r. 262 a receiving order against the firm operates as if it were an order against each member of the firm. The receiver could, therefore, under the receiving order, take possession of the infant's separate property, and that property is not liable to pay the judgment debt.

Under the old law, if one of three partners was an infant, there could not be a joint commission; there must have been separate

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carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case the Court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath, or otherwise as the Court may direct."

By the Bankruptcy Rules, 1886, r. 260: "Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm in England, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there."

Rule 262: "A receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who at the date of the order is a partner in that firm."

Rule 264: "No order of adjudication shall be made against a firm in the firm name, but it shall be made against the partners individually."

(1) 18 Ch. D. 109.

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commissions against the adult partners: *Ex parte Henderson* (1); *Ex parte Hardwicke.* (2)

[They were stopped by the Court.]

Cooper Willis, Q.C., and *Wedderburn*, for the petitioning creditors. How is a firm in which there is an infant partner to be made bankrupt? The judgment is against the firm, and a bankruptcy notice ought to follow the terms of the judgment: *In re Howes.* (3) An act of bankruptcy was committed by the firm by non-compliance with the notice, and the receiving order was properly made against the firm. It is not intended to apply for an adjudication against the infant, and his separate property cannot be affected. But the creditors are entitled to execute their judgment against the joint property of the firm. The receiving order may well stand, though an adjudication of bankruptcy cannot be made against the infant. The separate property of the infant will not be affected, and he cannot prevent the application of the joint property in paying the debts of the firm. He can disaffirm the contract of partnership, and thus get rid of all personal liability. He is in no way aggrieved by an order the effect of which is to apply the property of the firm in paying the debts of the firm. A receiving order against a firm is a valid order; it does not affect the infant partner personally any more than the judgment does.

Sir H. James, Q.C., in reply. An act of bankruptcy cannot be committed by a firm as such. The receiving order should be set aside altogether. Proceedings in bankruptcy involve quasi penal consequences: *In re Howes* (3); Bankruptcy Act, 1883, s. 163, sub-s. 2.

LORD ESHER, M.R. In this case a judgment was obtained under the provisions of the Rules and Orders under the Judicature Act against a partnership firm in the firm name. What is the legal effect of such a judgment? It is a judgment available against all the partners in the firm who are liable to have a judgment made against them. The legal effect, therefore, was, that it was a judgment available against the adult member of the firm, but it was not available at all against the infant.

(1) 4 Ves. 163. (2) 6 Ves. 434.

(3) [1892] 2 Q. B. 628.

He is not a person against whom the judgment could be effective in any way. It could be executed against the firm's property, because he as a partner cannot withdraw that property from the judgment, though it is no judgment against him. It does not make him personally a "judgment debtor." It is effective against the property of the firm, in which as a partner he may have an interest, but it is not a judgment against him personally. Therefore he never was a "judgment debtor." Now, the creditors who obtained that judgment could have had execution against all the property of the firm, that is, either a legal execution, if there was property to which a legal execution could be applied, or equitable execution, if there was property of the firm to which only an equitable execution would apply. The creditors had that right; but they were not satisfied with it, and they desired to proceed in bankruptcy. A creditor can proceed in bankruptcy against his debtor only for the purpose of obtaining an adjudication of bankruptcy against him. Every step which is taken in bankruptcy up to adjudication is taken for the purpose of obtaining an adjudication and for that purpose only. Different effects flow from the different steps, but they are all taken for the purpose of obtaining an adjudication, and the person who takes them cannot stop short at any one of them. He must go on to obtain an adjudication. For the purpose, then, of obtaining an adjudication these creditors issued a bankruptcy notice in the firm's name, and they served it on the firm, and they did that for the purpose of adjudicating some one a bankrupt. You cannot adjudicate the abstract thing called a "firm" bankrupt. You cannot make a firm bankrupt, unless you can make the members of the firm bankrupt. So that, by serving a bankruptcy notice on the firm, the creditors endeavoured to make the members of the firm bankrupt. The judgment obtained was against the firm; but one of the members of the firm is an infant, and the judgment does not affect him personally. He is not a "judgment debtor" by virtue of that judgment.

We must see whether a bankruptcy notice can be served in the way which has been suggested. A bankruptcy notice is issued under sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, for the purpose of presenting a bankruptcy petition and thereby

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obtaining a receiving order against a "judgment debtor." An infant is not a "judgment debtor." He is not, therefore, a person against whom a bankruptcy notice can have any effect. You cannot serve a bankruptcy notice on an infant so as to obtain an adjudication against him. But it is said you can serve a bankruptcy notice on the firm, so as to include the infant, that is, you can serve a bankruptcy notice on him. You cannot do that effectively, because he is not a "judgment debtor." Therefore his disobeying the notice is nothing. You cannot, because of his disobedience, adjudicate him a bankrupt. Can the creditor maintain the bankruptcy notice? As to one of the persons against whom they have issued the notice they cannot, as it is admitted, proceed to make him a bankrupt. They wish to stop short with regard to him at the receiving order, and not to go on to make him a bankrupt. It seems to me that, whenever you cannot proceed to adjudicate a person a bankrupt, it follows as a matter of course that you cannot obtain against him a receiving order, a receiving order being only a step towards making him a bankrupt. It follows that as against the infant there was no power to serve him with a bankruptcy notice, and no power to obtain a receiving order against him. It follows that the receiving order which includes the infant, because it includes those who are the partners in the firm, is a bad order as it stands. It is a bad order, because it includes a person against whom a receiving order cannot be made. If it is a bad order it must be set aside. All we decide is, that a creditor cannot by issuing a bankruptcy notice against a firm in the firm name obtain what is in effect a receiving order against all the partners in the firm, if one of them is a person against whom there is no valid judgment and who cannot be adjudicated a bankrupt. The receiving order, which includes him, is invalid, and being invalid it must be set aside. Whether the creditors have any other remedy against the adult partner without the infant is a question not now before us, and I express no opinion about it. The receiving order must be set aside.

LOPES, L.J. I need add only a few words, because the Master of the Rolls has gone so fully into the matter. It seems to me

clear that, in order to support a receiving order against a firm, each of the partners in that firm must have committed an act of bankruptcy. Applying that to the present case it is clear, having regard to what the Master of the Rolls has said, that one of the partners in the present case, viz., the infant, has not committed an act of bankruptcy. I think, therefore, that the receiving order is bad, and must be set aside.

KAY, L.J. I have come to the same conclusion. The receiving order is made against the firm, and the case has been argued as though the firm had a separate existence as distinguished from the individual members of the firm; in other words, as if it were a corporation having a separate existence from the individuals which compose it. It is no such thing, and the rules do not mean anything of the kind. Under the rules facilities have been given for proceeding against a firm in the firm name, for this simple reason,—that it is not always easy to find out who are the partners in a firm. But it was never intended to authorize a proceeding in that way against a person who could not be proceeded against individually. A judgment was obtained by these creditors against this firm in the firm name. There were only two partners, and one of them was an infant. We held in *Harris* v. *Beauchamp Brothers* (1), in which a similar judgment had been obtained by another creditor under the Judicature Rules against this firm, that execution might issue against any property of the firm within the jurisdiction. These creditors might have obtained a fi. fa. or, an elegit, if necessary, and might have executed the judgment against any partnership property within the jurisdiction, or if it was found that the property could not be reached by an elegit or a fi. fa., they might under the modern practice have obtained a receiver, which would have enabled them to take possession of that property. For some reason, which I do not understand, they were not content with that, but they want to make these two partners bankrupt. In order to do that they have served on the firm in the firm name a bankruptcy notice in respect of the judgment debt, and the non-compliance with that notice is the act of bankruptcy on which they rely. But the non-compliance with the notice was not an act of bankruptcy on

(1) [1893] 2 Q. B. 534.

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the part of the infant. The proceedings were wrong, because it is clear that you cannot obtain an adjudication of bankruptcy against a partnership, unless each one of the partners has committed an act of bankruptcy. And by r. 264 of the Bankruptcy Rules, 1886, it is specially provided that no order of adjudication shall be made against a firm in the firm name, but it shall be made against the partners individually. No order of adjudication could have been made in this case against the partner who was an infant. That partner had not committed an act of bankruptcy. He was not a debtor, and was not a person against whom an order of adjudication could have been made. It is argued, nevertheless, that a receiving order might be made against him. What is the effect of a receiving order? Under it the official receiver must take possession of both the joint and the separate property of every person whom it affects. By r. 262, "a receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who at the date of the order is a partner in the firm." Therefore this receiving order, so long as it stands, enables the official receiver to take possession, not only of the joint property, but also of all the separate property of the infant, if he has any. I agree that a receiving order is only to be made as a step towards an adjudication of bankruptcy, and when you cannot have an adjudication of bankruptcy, it seems to me that you ought not to obtain a receiving order. To allow this receiving order to stand would be in effect to put in the power of the official receiver the property of a person who could not be made a bankrupt, who has not committed an act of bankruptcy, and who is not subject to the bankruptcy laws. I think, therefore, that the receiving order is a bad one, and we must simply set it aside. If under the judgment any bankruptcy proceedings can be taken against the adult partner alone (as to which I express no opinion) they may be taken.

Appeal allowed and bankruptcy petition dismissed.

Nov. 3. The Court gave leave to appeal to the House of Lords. The appeal to be presented within a fortnight.

Solicitors: *Harper & Battcock; Godfrey & Webb.*

W. L. C.

IN RE FRANK. 1893 Nov. 14.

Bankruptcy—Small Bankruptcy—Summary Administration—Other Remedy against Property of Debtor—Leave to issue Execution—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 122, *sub-s.* 5.

Where an order has been made under s. 122 of the Bankruptcy Act, 1883, for the administration of the estate of a debtor, the county court has no power, under sub-s. 5 of that section, to give leave to a creditor to issue execution against the property of the debtor.

APPEAL from the order of the deputy judge of the Lambeth County Court, allowing one of the creditors of a debtor, with regard to whose estate an order for summary administration under Part VII. of the Bankruptcy Act, 1883, had been made, to issue execution.

The administration order, so far as material, was as follows: "Debts as scheduled amounting to 49*l.* 5*s.* 11*d.* to be paid to the extent of 1*s.* in £ by instalments of 10*s.* every four weeks, the first payment on July 10 next." The order then proceeded to deal with the costs of administration, and appointed a person to have carriage of the order.

On an application on behalf of a judgment creditor to set aside the above administration order, and for other relief, the deputy judge made an order of which the following is the material part: "Administration order to stand, but leave under s. 122 of the Bankruptcy Act, sub-s. 5, to proceed with execution."

This was the order now appealed from.

Cluer, for the appellant. By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122, sub-s. 5, where an administration order is made under that section, "no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a county court, except with the leave of that county court, and on such terms as that Court may impose." The exception enables the Court to give leave to obtain a committal order, which is a remedy against the person, or to seize under a bill of sale, which is a remedy against property, but was not intended to apply to execution, which is inconsistent with the administration order.

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Herman Robinson, for the respondent. The words of the section are wide enough to cover the present case, and the exercise of the judge's discretion ought not to be overruled.

WILLS, J. I have arrived at the conclusion that the view put forward by the appellant is right. We must regard the scheme of the Act, and it seems that the procedure contemplated by Part VII. of the Bankruptcy Act, 1883, is much the same as the ordinary procedure in Bankruptcy cases. The intention is that people in general are not to proceed with other remedies when once a receiving order or an order for administration has been made. It was, however, felt that there might be some cases in which it would be right to allow some other remedy to be adopted, and therefore the exception was inserted of cases where the Court may give leave. Sect. 122, sub-s. 5, of the Bankruptcy Act, 1883, is in very general words. It provides that "When the order is made no creditor shall have any remedy against the person or property of the debtor in respect of any debt, which the debtor has notified to a county court, except with the leave of that county court, and on such terms as that Court may impose." If we were satisfied that unless an order such as that made in the present case could be made, there would be nothing for this sub-section to operate on, that might afford some ground for upholding the order. But there may be cases in which the section can have effect. For instance, if the judge is satisfied that a committal order would be right, as in a case where a debtor has or has had means to pay the debt, and will not pay, or if he has acted fraudulently, then such an order might be made. That would be a remedy against the person. Then, as to remedies against the property, there is the case suggested by Mr. Cluer of the holder of a bill of sale with power to seize the goods comprised in the bill of sale. In that case seizure would be a remedy against the property, which a creditor could exercise with the leave of the Court, but not without such leave. That is one instance. I do not intend to try to enumerate the instances in which leave might be given; one is enough to shew that there is matter for the section to operate upon. So far as the creditor who is allowed to issue execution is concerned,

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an order such as this amounts to setting aside the administration order, and there is no jurisdiction to set it aside in that way. For these reasons I am of opinion that the appeal ought to be allowed.

WRIGHT, J. It is competent to the county court judge in making an administration order to say that the order is not to bind particular creditors, but when an order has once been made he cannot give leave to one creditor to issue execution without setting aside the order on some one of the five grounds specified in rule 15 of the General Rules as to Administration Orders under s. 122 of the Bankruptcy Act, 1883, made on December 21, 1888.

Appeal allowed.

Solicitor for appellant: *W. H. Sturt.*

Solicitor for respondent: *A. E. Cubison.*

P. B. H.

IN RE ERRINGTON. EX PARTE MASON.

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Nov. 21.

Bankruptcy—Proof—Interest on Mortgage—Transfer of Estates of Mortgagor and Mortgagee—Claim to prove for Arrears of Interest.

A mortgagor assigned his equity of redemption, and the estate of the two mortgagees was transferred, so that it vested in one of them alone. The assignee of the equity of redemption continued to pay interest on the mortgage, and when sued for arrears suffered judgment by default. He afterwards was adjudged bankrupt, and the transferee of the mortgage claimed to prove against his estate for further arrears of interest. The original mortgagor had absconded:—

Held, that there was no privity of contract between the assignee of the equity of redemption and the transferee of the mortgage, and no personal liability on the part of the assignee of the equity of redemption to pay interest, and the proof could not be allowed.

APPEAL by the official receiver acting as trustee in the bankruptcy of Errington from the order of the registrar of the county court at Carlisle, admitting the proof of a person named Geldard.

The facts, so far as material to the point decided, were as follows:—

On October 14, 1882, one Nicholson executed a mortgage of

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certain property to Geldard and a person named Donaldson, to secure payment of 600*l.* and certain specified interest. On November 14, 1885, Errington, the bankrupt, became the purchaser of Nicholson's equity of redemption, the mortgagees not being parties to the assignment. About the same time Geldard and Donaldson, the mortgagees, transferred their interest under the mortgage to Geldard and another person. Errington continued to pay interest to the transferees of the mortgage down to December, 1887, and an arrangement was made by which the days for the payment of interest were changed. In September, 1888, the transferees of the mortgage sued Errington in the county court for arrears of interest. Errington failed to appear, and the transferees of the mortgage recovered judgment against him by default for 18*l.* 1*s.* In May, 1889, a receiving order was made against Errington. The transferees of the mortgage afterwards transferred their interest, so that it became vested in Geldard alone. Geldard claimed to prove against Errington's estate for a sum of 121*l.* 7*s.* 10*d.* in respect of arrears of interest on the mortgage. The registrar of the county court disallowed the proof to the extent of 18*l.* 1*s.*, the amount of the county court judgment, which had not been transferred to Geldard alone, and admitted Geldard to prove for the balance of 103*l.* 6*s.* 10. It was stated in an affidavit used on behalf of the respondent that Nicholson, the original mortgagor, had gone abroad, and had not since been heard of.

The appeal was from so much of the registrar's order as admitted Geldard to prove.

Muir Mackenzie, for the appellant. The proof was wrongly admitted, for there was no personal liability on the part of the debtor to pay interest on the mortgage, and no privity of contract as between the debtor and the transferee of the mortgage. The rule on the subject is thus stated by Sir R. Pepper Arden, M.R., in *Woods* v. *Huntingford* (1): "Where a man buys subject to a mortgage, and has no connexion or contract or communication with the mortgagee, and does no other act to shew an intention to transfer that debt from the estate to himself as between

(1) 3 Ves. 128, at p. 132.

his heir and executor, but merely that which he must do if he pays a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally." The law, as there stated, is adopted in the notes to *Duke of Ancaster* v. *Mayer*. (1) The registrar was mistaken in supposing that the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 26, by virtue of which certain covenants are implied in mortgage deeds, can have any application to the present case. That section cannot create any privity of contract. The fact of the debtor having suffered judgment by default cannot create any new liability.

[VAUGHAN WILLIAMS, J., referred to the judgment of Earl Cairns, L.C., in *Kendall* v. *Hamilton*. (2)]

F. Cooper Willis, for the respondent. The conduct of the parties in altering the dates for payment of interest shews an intention on the part of the assignee of the equity of redemption to take upon himself the liability to pay interest. Nicholson, the original mortgagor, having disappeared, the proper inference is that Errington's liability was to be substituted. There is a liability which is proveable under s. 37, sub-ss. 3 and 8, of the Bankruptcy Act, 1886 (46 & 47 Vict. c. 52.)

Sect. 26 of the Conveyancing and Law of Property Act, 1881, creates a statutory liability.

Muir Mackenzie, replied.

VAUGHAN WILLIAMS, J. This is an appeal against an order allowing a proof by a transferee of a mortgage against an assignee of an equity of redemption. It is plain that by the mere assignment of the equity of redemption no liability on the covenant in the mortgage to pay interest to the transferee of the mortgage could be created. It is admitted that the mere fact of the assignment of the equity of redemption will not create a personal liability on the part of the assignee. Undoubtedly an assignment may take place under circumstances which give rise to a liability, and the respondent contends that in the present case something has happened since the assignment, the

(1) 1 White and Tudor's Leading Cases in Equity, 6th ed. at p. 756.
(2) 4 App. Cas. 504.

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effect of which is to give rise to such a liability. The original mortgagor having absconded, and the assignee of the equity of redemption having paid interest under the mortgage, the respondent asks us to infer that some new liability arose on the part of the assignee of the equity of redemption. But payment of interest by the assignee of the equity of redemption to the transferee of the mortgage is a perfectly natural act, and is done in order to preserve the mortgaged property from foreclosure. I asked the counsel for the respondent on what basis he put the liability, and he admitted that he could not contend that the original mortgagor was released. Generally where there is a novation the release of the original debtor is the consideration for the contract. If there were some other consideration the new contract would probably be a contract of suretyship.

Another point is taken, which is, that the liability is statutory by s. 26 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41). But all that Act does is to imply a covenant on the part of the mortgagor, and it does not impose on the assignee of the equity of redemption a personal liability in the absence of a covenant.

For these reasons I am of opinion that the proof was wrongly admitted.

KENNEDY, J., concurred.

Appeal allowed.

Solicitors for appellant: *Nicholson, Graham, & Graham.*
Solicitors for respondent: *Wright & Brown, Carlisle.*

P. B. H.

[IN THE COURT OF APPEAL.]

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Nov. 17.

IN RE SEMENZA. EX PARTE PAGET.

Bankruptcy—Practice—Security for Costs—Jurisdiction—Discretion—Foreign Creditor—Appeal against Rejection of Proof—Bankruptcy Acts, 1869 (32 & 33 *Vict. c.* 71); 1883 (46 & 47 *Vict. c.* 52)—*Bankruptcy Rules*, 1886 *and* 1890, *rr.* 131, 148.

In bankruptcy proceedings governed by the Bankruptcy Act, 1869, and the rules made under it, where a foreign creditor resident abroad appeals against the rejection of his proof by the trustee, the Court ought not now as a matter of course to exercise its discretion by ordering the creditor to give security for the costs of his appeal. The order ought only to be made in peculiar or extreme cases.

In re Vanderhaege, Ex parte Izard (20 Q. B. D. 146) discussed.

MOTION on behalf of the trustee in bankruptcy of the estate of G. Semenza, by way of appeal from the decision of one of the registrars, sitting as chief judge in bankruptcy under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), by which decision the registrar refused to order the Banca Tiberina of Rome to give security for the costs of an appeal against the rejection of their proof by the trustee.

The following material facts appeared from the affidavits: In 1874, Semenza filed his petition for liquidation of his affairs by arrangement, and J. Young was duly appointed, at a first meeting of creditors, trustee of the debtor's estate. In the same year, the Banca Italo Germanica, being a firm of foreign bankers resident in Italy, presented to the trustee their proof for a debt of over 10,000*l.*, alleged to be due to them from Semenza. The trustee, having made some inquiry into the claim, disputed it, and required further evidence in support of its validity, but he did not file any notice of rejection of the proof. Shortly after Semenza's bankruptcy, the Banca Italo Germanica went into liquidation, and assigned all their estate and assets (including their right of proof against Semenza's estate) to the Banca Tiberina, who were a foreign firm of bankers residing at Rome. Nothing definite was done in respect of the claim against Semenza's estate for many years. The matter was allowed

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to stand over, and there were facts disclosed in the affidavits from which it might be inferred that the delay ought rather to be attributed to the trustee than to the bank.

In September, 1888, J. Young died, having some years previously sold the debtor's estate to a purchaser for a composition of 5*s.* in the pound, the dividend to be paid on such debts as should be admitted by the trustee; and by an order, dated March 31, 1890, and made under s. 159 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Mr. Peter Paget, as an official receiver of bankrupts' estates appointed by the Board of Trade, became trustee of the debtor's estate in the place of J. Young. The Banca Tiberina then again put forward the claim against Semenza's estate originally made by the Banca Italo Germanica, and the trustee, having examined and considered it, ultimately rejected the proof, and duly filed notice of his rejection thereof. The Banca Tiberina thereupon gave notice of appeal against his decision, and the trustee applied to Mr. Registrar Hope, as chief judge in bankruptcy, for an order that the Banca Tiberina should give security for the costs of the appeal. The registrar refused to make the order, and the trustee now appealed from his refusal.

Cohen, Q.C., and *F. Whinney*, for the appellant. The registrar refused to order the Banca Tiberina to give security for costs on the ground that, since the decision in *In re Vanderhaege, Ex parte Izard* (1), he ought not to exercise his discretion in that way where security was applied for against a foreigner resident abroad. That decision, however, was upon the Bankruptcy Rules, 1886, made under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and has no application to the present case, which, being in respect of a bankruptcy pending when the Act of 1883 was passed, is governed by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and the rules made under it: see rr. 1, 352 of the Bankruptcy Rules, 1886 and 1890, and s. 169, sub-s. 3 of the Bankruptcy Act, 1883. There is no provision with respect to giving security for costs in the Act of 1869, or the rules; but there can be no doubt that there is ample jurisdiction in the

(1) 20 Q. B. D. 146.

Court to order security to be given. By s. 65 of the Act of 1869, the chief judge in bankruptcy has all the powers, jurisdiction, and privileges possessed by any judge of the Superior Courts of Common Law, or by any judge of the High Court of Chancery, and by s. 78 until rules have been made under the Act, and so far as such rules do not extend, the principles, practice, and rules on which Courts having jurisdiction in bankruptcy had theretofore acted in dealing with bankruptcy proceedings are to be observed by any Court having jurisdiction under that Act. Applying the principles upon which the Courts of Common Law and Chancery have acted in dealing with the question whether foreigners should be ordered to give security for costs, the registrar ought to have ordered security to be given here. A foreigner resident abroad who brings an action in this country has always been compelled to give security, and it is an analogous case where the foreigner seeks to enforce his claim in this country by proving against a bankrupt's estate. In *Redondo* v. *Chaytor* (1) the Court of Appeal held that a foreigner usually residing abroad, who was temporarily residing in England for the purpose of enforcing a claim by action, could not be called upon to give security for costs. But that decision was overruled by rule 6a of Order LXV., which in terms provides that a foreigner under such circumstances may be ordered to give security, shewing the intention of the legislature that the Courts should have a wide discretion in the matter.

F. Cooper Willis, for the respondents. Admitting that this case is governed by the Act of 1869 and the rules; also that the Court has jurisdiction to order the respondents to give security for the costs of their appeal against the trustees' rejection of their proof, still the discretion ought not to be exercised by ordering security to be given in this case. Under the Act of 1869, the trustee must accept or reject the proof within a reasonable time: *Ex parte Good, In re Armitage.* (2) He has not done so here, because the matter has been allowed to stand over for years. The rules made under the Bankruptcy Act, 1883, deal with this question of security for costs in two instances. By rule 131 of the Rules of 1886 and 1890, a party who intends to appeal to the

(1) 4 Q. B. D. 453. (2) 5 Ch. D. 46.

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Court of Appeal shall, at or before the time of entering his appeal, lodge in the High Court the sum of 20*l.* to satisfy, in so far as the same may extend, any costs he may be ordered to pay. By r. 148, a petitioning creditor who is resident abroad may be ordered to give security for costs to the debtor. Rules 131, 148 indicate the intention of the legislature that security should not as a general rule be ordered in cases other than the ones specified, and in exercising their discretion in bankruptcy proceedings governed by the Act of 1869 the Court ought to give effect to that intention. It is submitted that Cave, J., in *In re Vanderhaege, Ex parte Izard* (1), correctly stated the effect which rules 131, 148 ought to have in determining how the discretion should be exercised.

Cohen, Q.C., replied.

LORD ESHER, M.R. In this case something has been done or not done by the trustee in Semenza's bankruptcy, and the foreign bankers appeal against the trustee's decision. An application is then made by the trustee for security for the costs of that appeal. Suppose that this were a case governed by the last Bankruptcy Act—of 1883—and the rules made under it. That Act and the rules have dealt with the question of giving security for costs in bankruptcy proceedings. The first step towards making a man a bankrupt is a petition presented either by himself, or, if he has committed an act of bankruptcy, by a creditor. Until that step is taken, and until a receiving order is made, the man is a free man in regard to his property like any other person. The legislature, by the Act of 1883 and rules, has said that a foreigner resident abroad, if he comes to this country and takes that first step, by which the status and condition of the debtor as a free man in regard to his property is altered, may be ordered to give security for costs; but after the condition and status of the debtor have been altered by his being made a bankrupt, then the legislature has only dealt with the question of security for costs at a later stage in the procedure—namely, when there is an appeal to the Court of Appeal. Therefore, although the legislature has dealt with the idea of ordering security for costs to be given, it has

(1) 20 Q. B. D. 146.

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dealt with it as regards those two periods only, and has left out the intermediate stages of the procedure. When the debtor has been made a bankrupt, his property has to be dealt with for the benefit of his creditors, and a trustee is appointed to inquire into the condition of the estate, and to determine the number of creditors who are entitled to come upon it. Now, the trustee may himself be one of the creditors. He is authorized by the legislature to decide certain specified matters; but he is not and cannot be a judge, because, as he may himself be a creditor of the estate, he may be interested in the very matters he is called upon to determine. He is not in any way a Court or a judge. He has to make inquiry, and, though he may himself be a creditor, he has to come to a decision as against other persons who are also creditors. If he decides against the proof of one of those other persons, then all the larger will be the estate available for paying his own debt, if he should be a creditor. But the person whose proof has been rejected may say, "I should like a Court to decide this matter between you and me," and then for the first time the matter—namely, the dispute between the two creditors—comes before the Court. Can it be right to say to the creditor who desires to invoke the aid of the Court, "You are a foreigner resident abroad. By our English law you cannot bring any action to recover your debt. You cannot be paid the whole of your debt; but, though you desire to discuss with the other creditors whether you are entitled to prove against the debtor's estate, you cannot bring your dispute before the Courts unless you give security for costs"? It is not like the case of a foreigner who brings an action against a person in this country, nor like the case of a petitioning creditor who by what he does is seeking to alter the position and status of the parties. I am of opinion that in such a case as this the foreigner, who seeks to bring before the Court the question whether his proof has been rightly rejected by the trustee, ought not to be ordered to give security for costs. I think that the legislature, in dealing in the rules made under the Act of 1883 with the question of security for costs, advisedly left out this intermediate proceeding in the bankruptcy, and refrained from making a rule that security for costs should be given. I do not think that by omitting to make

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such a rule the legislature has taken away the jurisdiction of the Court to order security to be given; but the rules which have been made—that security may be ordered to be given in the two cases of a petitioning creditor who is a foreigner resident abroad, and of an appeal to the Court of Appeal—are strong to shew that the jurisdiction, with regard to this intermediate step in the bankruptcy procedure, ought only to be exercised in extreme cases. To say exhaustively what those extreme cases would be is impossible; but I can conceive that, if the registrar were able to see that the claim was shadowy in the extreme, and the appeal against the trustee's decision was very unlikely to succeed, then he might order security to be given. I do not say that that is the only case in which the jurisdiction might be exercised with respect to a foreigner resident abroad who appeals against the rejection of his proof by the trustee. There may be other extreme or serious cases; but I am of opinion that, where the dispute is one which may fairly and reasonably be decided one way or the other, the Court ought not, having regard to the rules made under the Act of 1883, to make the order that security for costs should be given. I think that Cave, J., decided *In re Vanderhaege, Ex parte Izard* (1), on that ground. It appears to me that he was careful to avoid saying there was no jurisdiction at all. In the first part of his judgment he says: "The counsel for the trustee was unable to produce any enactment or authority that security for costs can be ordered in such a case as this." The words "can be" do look as though he meant that there was no jurisdiction; but then he goes on: "The Rules which have been referred to indicate the cases in which such security can be required, and that raises the primâ facie inference that it cannot be enforced in cases which are not mentioned in the Rules. I think it would be oppressive to require a creditor resident abroad, who is prosecuting his claim to prove against a bankrupt's estate here in due course, to give security for costs of an appeal against the rejection of his proof by the trustee." I think the learned judge's real meaning was that, primâ facie, security ought not to be enforced except in peculiar cases. That decision appears to me to have been right. It

(1) 20 Q. B. D. 146.

comes, then, to this:—Under the Act of 1883 and the rules there is a discretion to order security for costs; but it ought not to be exercised where there is a fair subject of dispute involved, and it ought only to be exercised in extreme cases. If that be so, how ought we to govern ourselves in exercising our discretion in a case which comes under the Act of 1869? It cannot be doubted that we have a discretion under that Act; but we have to exercise it in a case which comes before us after the making of the rules under the Act of 1883. I am of opinion that the rules made under the Act of 1883 can guide us, and ought to guide us, in exercising the discretion in a case within the Act of 1869. If that discretion ought to be exercised in the way I have stated in a case under the Act of 1883, we ought now to exercise it in the same way in a case under the Act of 1869, and the registrar, therefore, ought to have exercised his discretion in the way suggested by the decision in *In re Vanderhaege, Ex parte Izard* (1), That is exactly what the registrar did. I think he was right, and it follows that this appeal should be dismissed.

LOPES, L.J. The respondents, who are foreigners resident abroad, tendered their proof to the trustee in Semenza's bankruptcy. The trustee rejected the proof, and the respondents are appealing against his decision. Under these circumstances, the trustee asks that they may be ordered to give security for the costs of the appeal. The bankruptcy is under the Act of 1869, and we have to consider the important question how the discretion with respect to ordering security to be given ought now to be exercised under that Act. Amongst the rules made under the Act of 1869, there is no rule applicable to the matter of security for costs. It is not disputed that under that Act there is jurisdiction to order security to be given; but the mode in which that jurisdiction is to be exercised must have been left to the Court. If that be so, there is jurisdiction; but the exercise of that jurisdiction is discretionary. In determining how the discretion should be exercised, I think we can get no better guidance than by considering the rules made under the Bankruptcy Act, 1883, and seeing what the legislature thought

(1) 20 Q. B. D. 146.

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it right should be done in cases like this occurring under the Act of 1883. Unlike the Act and Rules of 1869, the rules made under the Act of 1883 have special provisions with respect to security for costs, and those provisions are contained in rules 131 and 148. Rule 131 provides that at or before the time of entering an appeal to the Court of Appeal the party intending to appeal shall lodge in the High Court the sum of 20*l.* to satisfy, in so far as the same may extend, any costs that the appellant may be ordered to pay; but the Court of Appeal may increase or diminish the security or dispense therewith. That rule obviously is not applicable to a case like the present. Rule 148 provides that a petitioning creditor who is resident abroad may be ordered to give security for costs to the debtor. It is perfectly clear, therefore, that neither of those two rules applies to a case like the present, in which foreign creditors residing abroad are appealing against the rejection of their proof by the trustee in bankruptcy, and it is most significant that such a case is in no way provided for by the rules. One is led to the conclusion that the legislature thought it ought not to be provided for like the other specified cases, and I think the course taken by the legislature in inserting those special provisions in the rules made under the Act of 1883 is a good guide to us in exercising our discretion under the Act of 1869, and warrants us in saying that security ought not to be ordered where the circumstances are such as exist here. The registrar took that view. He acted upon Cave, J.'s, judgment in *In re Vanderhaege, Ex parte Izard* (1), and I think he was right. In my reading of that judgment it does not go the length of saying that there was no jurisdiction to order security to be given; but it says, in effect, that the jurisdiction ought not to be exercised in ordinary cases. Another matter induces me to think that the registrar was right in this case. There has been extraordinary delay over the proceedings in this bankruptcy, and that delay, to my mind, is attributable in some degree to the trustee.

KAY, L.J. One very great evil with which the Court have to deal is, and always has been, the enormous expense of winding

(1) 20 Q. B. D. 146.

up insolvent estates—whether of joint stock companies, of bankrupts, or of deceased persons. It is always found that the expenses of winding-up absorb a very large part—in some cases all—of the estate left for division amongst the creditors. In bankruptcy the legislature has for many years been struggling with that evil; and, speaking for myself, I think it would be very disastrous to hold that foreign creditors resident abroad might bring their claims against a bankrupt's estate to this country, and appeal from the decision of the trustee refusing to admit those claims, without being subject to any power of the Court to order them to give security for the costs of the appeal. I think, however, all agree that the Court has jurisdiction to order security to be given. Were it otherwise, claims of the most shadowy kind might be made against bankrupts' estates, and, when disallowed by the trustee, the persons who made them might appeal against the disallowance with a light heart, because they were able to say, "We are foreigners resident abroad. We have no property in England; the worst that can happen to us is that we shall have to pay our own costs in the appeal." The matter was not treated in that way under the Bankruptcy Act of 1869. There was no rule made under that statute to fetter the discretion of the Court, and we are told that it was the practice in cases like the present to order security for costs to be given. I do not think that the Act of 1883, and the rules made under it, have destroyed the power of the Court to exercise their discretion by ordering security to be given; because rule 353 provides that "where no other provision is made by the Act or these rules, the present law, procedure, and practice in bankruptcy matters shall, in so far as applicable, remain in force," and the only rules which seem to have the effect of restricting the operation of rule 353 are rules 131 and 148, the first of which applies where there is an appeal to the Court of Appeal, and the second where the petitioning creditor is a foreigner resident abroad. The fact that those two cases are specially referred to by the rules does not necessarily imply an exclusion of all other cases, because rule 353 has the effect of enabling the Court to deal with the case of a foreign claimant in the same way as before. I am therefore of opinion that there is jurisdiction in such a case as

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this, if the Court thinks the circumstances require it, to order the foreign claimant to give security for costs. If the judgment of Cave, J., in *In re Vanderhaege, Ex parte Izard* (1), means that the Court has no such jurisdiction, I venture to express my dissent from it; but I do not think, upon reading the judgment, that the learned judge meant to go the length of saying there was no jurisdiction. If there is jurisdiction the question of discretion is for the Court. In this case, the registrar, looking at the decision of Cave, J., has come to the conclusion that in exercising the discretion he ought to be guided by rules 131 and 148. The true result is that security ought not to be ordered to be given except in cases of a peculiar nature. It is not a matter of course that, merely because the person who is appealing against the rejection of his proof is a foreigner resident abroad, he should be ordered to give security. That would be a very harsh rule to lay down. In the great majority of instances the claim can be very easily and promptly decided without involving any great expense to the estate. Now, what are the facts here? The respondents' claim was brought forward in 1874, and the trustee was then not satisfied that it was good. The sum claimed is a large one, being at least 10,000*l.*, and the claim is made by foreign bankers resident abroad. Probably no particular harm would be done if the respondents were ordered to give security. On the other hand, the trustee did not formally reject the claim when it was first brought forward. There was considerable delay in the matter, which seems to me to have been rather the delay of the trustee than of the claimants. He has not adjudicated promptly, and either accepted or rejected the claim. He has allowed it to hang on for years, and he does not, therefore, come with a very good grace to ask that he should have security for costs of the appeal against his decision when he has at length formally rejected the proof. Therefore, although the claim is a very large one, although there would be no particular hardship on the respondents if they were ordered to give security, and although the investigation of the claim in the appeal may be difficult and expensive, I am not inclined to interfere with the discretion which the

(1) 20 Q. B. D. 146.

registrar has exercised. I am, therefore, of opinion that this appeal fails, and this motion should be dismissed.

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Appeal dismissed.

Solicitors for appellant: *Lawrence, Waldron, & Webster.*
Solicitors for respondents: *Rivington & Sons.*

W. A.

IN RE HAWKINS. EX PARTE HAWKINS.

1893 *Nov.* 21.

Bankruptcy—Proof—Alimony—Arrears accrued after Receiving Order.

Arrears of alimony payable by a debtor to his wife under an order of the Divorce Division of the High Court of Justice, which become due after a receiving order has been made against the debtor, cannot be proved for by the wife in the bankruptcy of the debtor.

APPEAL from an order of the county court at Exeter disallowing a proof in bankruptcy.

An order had been made in divorce proceedings that the debtor should pay, or cause to be paid, certain alimony to his wife. A receiving order was made against the debtor, and after the date of the receiving order, but before the debtor had obtained his discharge in bankruptcy, certain payments became due under the order for alimony, and fell into arrear. The wife sought to prove for these arrears of alimony, and her proof having been disallowed she now appealed.

Roskill, for the appellant. The proof ought to have been admitted. The case of *Linton* v. *Linton* (1), where it was held that future payments of alimony were not a "debt or liability," and could not be proved for in bankruptcy, is distinguishable, for here the payments have already accrued due, and therefore the arrears have become a sum certain, and there is a proveable debt within the meaning of s. 37 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). *Ex parte Fryer, In re Fryer* (2), does not carry the doctrine of *Linton* v. *Linton* (1) any further. In *In re Mercantile Mutual Marine Insurance Association* (3) it was

(1) 15 Q. B. D. 239. (2) 17 Q. B. D. 718.
(3) 25 Ch. D. 415.

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held that the liability in respect of calls of a liquidating member of a company, where the liquidation proceedings commenced prior to the winding up of the company, and were pending at the time of winding up, was a debt or liability which was proveable in the liquidation under the Bankruptcy Act, 1869. [He also referred to *In re East India Cotton Agency; Furdoonjee's Case* (1); *Ex parte Sheffield, In re Austin.* (2)]

Muir Mackenzie, for the respondent. The proof was rightly rejected. In order to make a claim proveable under s. 37, sub-s. 3, of the Bankruptcy Act, 1883, there must be a debt or liability, certain or contingent, to which the debtor is subject at the date of the receiving order. Here there was no such debt or liability at that date. The claim was not then proveable, and the debtor cannot make it proveable by waiting. The order for alimony may at any moment be set aside or varied by a further order of the Divorce Division of the High Court. As Baggallay, L.J., says, in *Linton* v. *Linton* (3), "An order for payment of alimony may be varied from time to time according to the means of the husband: there is therefore no means of putting a value upon the future payments for the purpose of a proof in bankruptcy." The decision in that case is conclusive in the present case. [He also referred to *Collyer* v. *Isaacs.* (4)]

Pitt Lewis, Q.C., amicus curiæ (5), referred to *Bailey* v. *Bailey.* (6)

Roskill, in reply, referred to *Prescott* v. *Prescott* (7); *Kent* v. *Thomas* (8); *In re Otway, Ex parte Otway.* (9)

VAUGHAN WILLIAMS, J. I am of opinion that this proof was rightly rejected.

I will take first the narrower contention, on which the respondent prefers to rest his case. It may be that a distinction is properly made between arrears payable before and those

(1) 3 Ch. D. 264.
(2) 10 Ch. D. 434.
(3) 15 Q. B. D. 239, at pp. 245, 246.
(4) 19 Ch. D. 342.
(5) *Pitt Lewis, Q.C.*, was instructed on behalf of the debtor; but the Court held that he was not entitled to be heard.
(6) 13 Q. B. D. 855.
(7) 20 L. T. (N.S.) 331.
(8) Law Rep. 6 Ex. 312.
(9) 5 Morrell's Bank. Cas. 115.

payable after the date of the receiving order, as to which latter arrears the case of *Linton* v. *Linton* (1) is a clear authority that they are not proveable. In order to make a debt proveable there must be at least a contingent liability, and there is a right of proof directly the receiving order is made if the amount is capable of being assessed. I have come to the conclusion that we have no right to say that the present case is outside the decision in *Linton* v. *Linton* (1) on the ground that the instalments have become payable between the date of the receiving order and the time when it is sought to prove. That case is a decision that where the arrears are not payable at the date of the receiving order there is no proveable debt, on the ground that the amount is incapable of being assessed, for the Divorce Court may vary the order. Such instalments as these in my opinion are within the rule in *Linton* v. *Linton* (1), as being future instalments of alimony.

Then as to the other point, I do not see how there can be any proof for arrears of alimony incurred at any time. It is true that such arrears are a debt in respect of which a man may be imprisoned under the Debtors Act, 1869, but no action at law will lie for the arrears, and the obligation is not one in respect of which a bankrupt can get his discharge or any relief in bankruptcy. As to future instalments there can be no doubt that the decision in *Linton* v. *Linton* (1) is conclusive. The Master of the Rolls said in that case: "A man's personal earnings after his bankruptcy do not go to his creditors; he keeps them himself notwithstanding his bankruptcy. He is as well able to pay alimony of this kind after his bankruptcy as before." (2) It is plain from this that the Master of the Rolls was of opinion that the obligation continued, and it is equally plain that there is no obligation imposed on a bankrupt to pay any proveable debt except by proof in the bankruptcy. The judgment of the Master of the Rolls shews that the order for payment of alimony can be enforced both before and after the discharge in bankruptcy; and this is consonant to justice, for a man's obligation to support his wife cannot cease on his bankruptcy. I can well imagine a state of circumstances where,

(1) 15 Q. B. D. 239. (2) 15 Q. B. D. 239, at p. 245.

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notwithstanding his bankruptcy, a man may be living in affluence. The principle of alimony is that a man is under an obligation to support his wife, which continues uninterrupted down to the time of his discharge, and is unaffected by his discharge.

For these reasons, both on the point relied upon by Mr. Muir Mackenzie and on the broader ground that there can be no proof at all for arrears of alimony, I am of opinion that the proof in this case was rightly rejected.

KENNEDY, J. I entirely agree, and I am of opinion that the wider ground is quite as strong as the narrower, for, unless bankruptcy releases a man altogether from the obligation to support his wife, it is clear that there can be no proof for alimony.

Then as to the other point, there is no contract to pay alimony, but there is an order of the Court, which may be varied, and which may not last. That being so, can there be a valuation of the liability? I am of opinion that there cannot. Then it is said that arrears which accrued due since the bankruptcy are proveable, for it is said that there is an assessment made subsequent to the receiving order; but this contention cannot prevail if at the date of the receiving order the amount cannot be assessed.

Appeal dismissed.

Solicitors for appellant: *Makinson, Carpenter & Son, for Alfred Burrow, Collumpton.*

Solicitor for respondent: *The Solicitor to the Board of Trade.*

P. B. H.

[IN THE COURT OF APPEAL.]

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SIMMONDS *v.* HEATH.

Tithe—Extraordinary Tithe Rent-charge, Charge in lieu of—Hop Ground forming Part of Farm—Sale of Farm in Portions—Hop Ground only Chargeable—Extraordinary Tithe Redemption Act, 1886 (49 & 50 *Vict. c.* 54), *ss.* 1–4.

By the Extraordinary Tithe Redemption Act, 1886, after reciting in the preamble that by the Acts relating to the commutation of tithes power is given to impose an "extraordinary charge" on hop grounds, orchards, fruit plantations, and market gardens, it is provided (s. 2) that the Land Commissioners for England shall "ascertain in each parish in England and Wales and certify the capital value of the extraordinary charge on each farm, or, where not a farm, on each parcel of land, in respect of which the said charge is payable at the date of the passing of this Act," and (s. 4, sub-s. 1) that "land in respect of which at the date of the passing of this Act extraordinary charge is payable shall, so soon as the capital value of the said charge shall have been certified under the provisions of this Act, be charged with the payment of an annual rent-charge equal to four per centum on such capital value, in lieu of the extraordinary charge . . . such rent-charge to be a charge upon the particular farm or parcel of land in respect of which the same has been assessed":—

Held, that the rent-charge under the Act is only chargeable on land in respect of which at the date of the passing of the Act extraordinary charge was payable, and, therefore, where part only of a farm was cultivated, and chargeable with extraordinary charge, as hop ground at the date of the passing of the Act, the whole farm could not be made chargeable with such rent-charge under the Act.

APPEAL from the judgment of a Divisional Court (Lawrance and Collins, JJ.), affirming the judgment of a county court judge.

The action was brought by the plaintiff in the county court to recover from the defendant a proportionate part of sums paid by the plaintiff in respect of rent-charge arising under the Extraordinary Tithe Redemption Act, 1886.

The facts were as follows. At the time of the passing of the Extraordinary Tithe Redemption Act, 1886, a farm in the parish of Aldershot, in the county of Southampton, called Boxall's farm, containing 107 acres, belonged to one Allden. A portion of such farm, consisting of fifteen acres, was used as a hop ground for the cultivation of hops. After the passing of the

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Act, but before the capital value of the extraordinary charge in respect of such hop ground had been ascertained under the provisions of the Act, Allden sold the farm in portions. Eighty-eight and a half acres, which included the fifteen acres used as a hop ground, were sold to the plaintiff. Thirteen and a half acres were sold to the defendant, and five acres to another person.

In March, 1889, the Land Commissioners certified the capital value of the extraordinary tithe rent-charge on each farm, or where not a farm on each parcel of land, in the parish of Aldershot in the county of Southampton, in respect of which the said charge was payable at the date of the passing of the Act, to be as set forth in the schedule to their certificate. The schedule contained an entry as follows:—

Landowner.	Description of farm or parcel of land.	Number in map hereto annexed.	Acres.	Certified capital value of the charge.	Resulting annual 4 per cent. rent-charge.
				£	£ s. d.
Simmonds, Richard, and Heath, Thomas.	Boxall's Farm.	4	88½	157	6 5 7
		4*a*	13½		

The remaining five acres which had formed portion of Boxall's farm were by some oversight omitted.

The plaintiff, having paid the full annual charge of 6*l.* 5*s.* 7*d.* during the period of four years from 1889 to 1892, sued the defendant in the county court for the sum of 3*l.* 6*s.* 4*d.*, as being the proportion calculated according to acreage of the total amount of the charge for the four years which the defendant was liable to contribute. The county court judge held that all the provisions of the Tithe Commutation Acts in relation to an apportionment of tithe rent-charge being rendered applicable to the rent-charge under the Extraordinary Tithe Redemption Act, 1886, by s. 9 of that Act, the only remedy open to the plaintiff was to get the defendant's contribution determined by justices under the provisions of 5 & 6 Vict. c. 54, s. 16; and, therefore, that the action in the county court for contribution

would not lie. On appeal the Divisional Court affirmed his judgment. (1)

Daldy, for the plaintiff. By the Extraordinary Tithe Redemption Act, 1886, no extraordinary charge under the Tithe Commutation Acts is to be charged on hop grounds, orchards, fruit plantations, or market gardens newly cultivated as such after the passing of the Act; and the Land Commissioners are to fix the capital values of the extraordinary charges already existing in respect of such subject-matters, and upon such values a fixed annual rent-charge of 4 per cent. is to be payable. The scheme of the Act contemplates either valuation by farms or valuation by closes; where the matters in respect of which extraordinary charges arise are on farms, the rent-charges in lieu of such charges may be assessed on such farms; where there is no farm, the charge is to be assessed in relation to and charged upon the particular parcel of land. By s. 2 of the Act it is provided that the Land Commissioners shall "certify the capital value of the extraordinary charge on each farm, or, where not a farm, on each parcel of land, in respect of which the said charge is payable at

(1) The preamble of the Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), is as follows: "Whereas by the Acts relating to the commutation of tithes in England and Wales, power is given to impose an extraordinary charge and an additional rent-charge by way of extraordinary charge (both which charges are hereinafter included under the expression 'extraordinary charge') on hop grounds, orchards, fruit plantations and market gardens."

Sect. 2: "The Land Commissioners for England, hereinafter referred to as "the Commissioners," shall, as soon as may be after the passing of this Act, ascertain in each parish in England and Wales, and certify the capital value of the extraordinary charge on each farm, or where not a farm on each parcel of land, in respect of which the said charge is payable at the date of the passing of this Act."

Sect. 4, sub-s. 1: "Subject to the provisions of this Act with respect to the redemption of charges, land in respect of which, at the date of the passing of this Act, extraordinary charge is payable shall, so soon as the capital value of the said charge shall have been certified under the provisions of this Act, be charged with the payment of an annual rent-charge equal to four per centum on such capital value, in lieu of the extraordinary charge which shall cease on the half-yearly day of payment thereof which shall immediately precede the date of the said certificate, such rent-charge to be a charge on the particular farm or parcel of land in respect of which the same has been assessed."

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the date of the passing of this Act." In this case, the hop ground forming part of a farm at the date of the passing of the Act the commissioners assessed the charge on the whole farm as it existed at that date, as provided by the Act. By s. 3, in estimating the capital value of the charge, the commissioners are to take into consideration, among other things, "the prospect of the substitution of other land *on the same farm* for such cultivation," which shews that a valuation by farms was contemplated. By s. 4, sub-s. 1, the rent-charge under the Act is to be "a charge upon the particular farm or parcel of land in respect of which the same has been assessed."

[LORD ESHER, M.R. Must not the plaintiff make out that the defendant's land was chargeable with the extraordinary charge before the passing of the Act, because by s. 4 it is only "land in respect of which, at the date of the passing of this Act, extraordinary charge is payable" which is chargeable with the payment of the rent-charge under the Act?]

By the Tithe Commutation Act, 1836 (6 & 7 Wm. 4, c. 71), ss. 40 and 42, provision is made for an extraordinary charge upon hop grounds, &c., which is to be at a rate per imperial acre; and by s. 85 of that Act any rent-charge chargeable on land under the Act is enforceable by distress on all other lands in the hands of the same occupier.

[KAY, L.J. That section does not make it a charge on those other lands. There could not be a distress upon them if they passed into the hands of other persons.]

It shews that in effect where lands were held as one farm at the date of the Act of 1886, the charge was incident to the whole occupation. The concluding words of s. 4, taken in conjunction with the terms of ss. 2 and 3, sufficiently shew that the intention was that, where the hop ground formed part of a farm at the passing of the Act, the farm as a whole was to be assessed and chargeable; and, as by s. 1 of the Act, lands newly cultivated as hop grounds, &c., are freed from any liability in future to extraordinary charge, it is only reasonable that the tithe owner should have an increased security for the charge created under the Act.

The Land Commissioners having made this assessment on the farm as a whole, the defendant's remedy, if it is incorrect or

unfair, is to get it set aside or amended; but while it stands it is binding on him.

Cecil Chapman, for the defendant, was not called upon.

LORD ESHER, M.R. In this case, at the time of the passing of the Extraordinary Tithe Redemption Act, 1886, a farm, called Boxall's farm, belonged to one Allden; and part of such farm, amounting to fifteen acres, was being cultivated as a hop ground. The owner of that farm sold it in portions to three persons. One portion, amounting to eighty-eight and a half acres, was sold to the plaintiff. In that portion was included all of the fifteen acres cultivated as hop ground. Thirteen and a half acres were sold to the defendant, no portion of which had been cultivated as hop ground; and another person purchased other five acres which were in the same position. The plaintiff has paid the rent-charge in question from the year 1889 to 1892. The plaintiff, in whose land is the hop ground, having paid the rent-charge which arises in respect of its cultivation as such, seeks to say to the defendant, who has no land which has been cultivated as hop ground, that he must bear a proportion of the charge so paid. That contention seems to me to produce so obviously an unjust result that we ought to consider carefully whether, on the true construction of the enactments on the subject, such was the intention of the legislature. The question is whether the defendant could have been made by any process to pay any part of this charge; for, if he could not, then the plaintiff cannot shew that he has been compelled to pay anything which the defendant could by law have been compelled to pay, as he must do in order to maintain this action. That question depends on the Extraordinary Tithe Redemption Act, 1886. As I have said, at the time of the passing of that Act, the farm called Boxall's farm all belonged to one owner. What were the powers of the commissioners or of any other persons at that time with regard to that farm? The preamble of the Act runs as follows: "Whereas, by the Acts relating to the commutation of tithes in England and Wales, power is given to impose an extraordinary charge and an additional rent-charge by way of extraordinary charge (both which charges are hereinafter included under the

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expression 'extraordinary charge') on hop grounds, orchards, fruit plantations, and market gardens." Could there have been at that time an extraordinary charge imposed on Boxall's farm as a whole? It appears from the words of the preamble that there could not; that the only extraordinary charge that could have been imposed was on hop grounds, orchards, fruit plantations, and market gardens. At the date of the Act, the farm was no doubt in the hands of one person; but it would appear that there was an extraordinary charge in respect of a portion of it only which was used as a hop ground. I shall not stop to inquire very closely whether, under the Acts, if there had been a failure to pay that charge in respect of the hop ground, a distress could have been levied on other parts of the farm in the same person's hands. It may be that, this extraordinary charge being imposed on the hop ground, the legislature gave power to distrain in respect of that charge, not merely on the land charged, but on other land in the same occupation; but that would not make it a charge on the other land; it only gives a power of distress as against the occupier whose land is charged on other land in his occupation not subject to the charge. If so, the farm is not charged, and, if the owner sells the hop ground, he sells that which is subject to the charge; but, if he sells the other part, he does not sell anything which is charged. The person who occupies that part cannot be distrained upon, because he has no land subject to the charge. The statutory power of distress may be to distrain as against the person who occupies a portion of land which is charged on other land forming portion of his farm while in his occupation, but not to distrain on such land when it is in the hands of other persons. If that be so, there never was any power to distrain as against the defendant, for the defendant never had any land which was subject to the charge, and no commissioners had any power to impose a charge upon him in respect of any land which belonged to him. That being so, if the certificate of the Land Commissioners is to be construed to mean that they have assumed to assess the charge on the defendant's land, then I think they have gone beyond their powers, and what they have done is invalid. The words in the preamble of this Act would not, of course, be conclusive, if it could have

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been shewn that by the Acts, the effect of which it professes to recite, such a charge as this could have been imposed on the defendant's land. But, when we turn back to s. 42 of the Tithe Commutation Act, 1836 (6 & 7 Wm. 4, c. 71), and the other enactments which have been referred to, it seems clear that the terms of the preamble to the Act of 1886 are correct, and that the power which then existed was confined to imposing this extraordinary charge on such portions of land as were used for the extraordinary purposes specified; so that there was no power to impose such a charge on the whole farm, but only on such portion thereof as was used for a hop ground, orchard, fruit plantation or market garden, and the power of distress on other land only affected the person who occupied the land on which the charge was imposed; but on other land, which might have been occupied by him but had ceased to be so, there was no power of distress for the charge. The learned judges in the Divisional Court assumed, for the purposes of their judgment, that the defendant's land was liable to the charge, and directed their inquiry to the question whether the claim against him could be enforced in the county court or the only remedy was by application to magistrates. In our view, that question does not arise. The result is that the appeal fails, and the judgment must be affirmed, though not on the grounds given by the Divisional Court.

LOPES, L.J. I am of the same opinion. I think that the Divisional Court were right in the result at which they arrived; but I do not proceed on the grounds on which they proceeded. The case for the plaintiff is that he has paid money for the defendant which the defendant was compellable by law to pay, and therefore the defendant is bound to indemnify him. If he could make that out, he would be entitled to succeed. I think, however, that the effect of the legislation as stated in the preamble to the Act of 1886 is a complete answer to his case; and, looking to the previous Acts, it appears to me that that preamble correctly represents the law. The Act of 1886 seems to me to give power to the commissioners to assess a charge on certain specified properties, viz., hop grounds, orchards, fruit plantations,

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and market gardens; and in my opinion there is no power to impose it on any other properties. The defendant is not the owner of a hop ground, or any of the other subject-matters specified. That being so, how can it be said that the plaintiff has paid anything which the defendant was by law compellable to pay? He was not compellable to pay anything in the nature of extraordinary charge, and therefore the plaintiff has no right of indemnity against him.

KAY, L.J. I have come to the same conclusion. The question in the case appears to turn upon the construction of the Act of 1886, which provides for the commutation of extraordinary tithe by rent-charges on certain properties cultivated as hop grounds, orchards, fruit plantations, and market gardens. The material section appears to me to be the 4th, which provides, that "subject to the provisions of this Act with respect to the redemption of charges, land in respect of which at the date of the passing of this Act extraordinary charge is payable shall, so soon as the capital value of the said charge shall have been certified under the provisions of this Act, be charged with the payment of an annual rent-charge equal to 4 per centum on such capital value, in lieu of the extraordinary charge which shall cease on the half-yearly day of payment thereof which shall immediately precede the date of the said certificate, such rent-charge to be a charge upon the particular farm or parcel of land in respect of which the same has been assessed." What has occurred with regard to the farm now in question is as follows. A portion of it has been cultivated as a hop ground. That was subject to the extraordinary charge. The commissioners, having estimated the capital value of that extraordinary charge, have issued a certificate, the meaning of which may be doubtful, and in respect of that capital value they have assessed a rent-charge at the rate specified in the Act to be paid in lieu of the extraordinary charge. The question is, on what land that rent-charge became chargeable by virtue of the operation carried on under the Act. It seems to me clear from the words of s. 4 that there was no power to charge any lands but those subject to the extraordinary charge before existing. When we look at the preamble of the

Act, it would appear that such charge could only be imposed on land cultivated as hop grounds, orchards, fruit plantations, or market gardens. When we examine the Acts to which the preamble refers, they confirm its language, and shew that it was only on land cultivated as I have mentioned that such a charge could be imposed. Therefore in this case the charge could only be on the hop ground. The part of the farm sold to the defendant never was cultivated as a hop ground. The plaintiff, who has bought that part of the farm which included what was so cultivated, seeks to make the defendant bear a portion of the charge. It seems to me that it would be contrary to justice if he could do so. Therefore, without expressing any opinion on the point decided in the Divisional Court, I am of opinion that the appeal fails.

Appeal dismissed.

Solicitor for plaintiff: *Richard White, for Potter & Crundwell, Farnham.*

Solicitor for defendant: *Walter Wilcocks, for Ernest Jackson, Farnham.*

E. L.

[IN THE COURT OF APPEAL.]

ETHERLEY GRANGE COAL COMPANY, LIMITED, APPELLANTS; AUCKLAND DISTRICT HIGHWAY BOARD, RESPONDENTS.

Highway—Repair—"Extraordinary Traffic"—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.

The standard of comparison by which to determine whether traffic is "extraordinary" within the meaning of the Highways and Locomotives (Amendment) Act, 1878, s. 23, is the ordinary traffic on the road in question, not that on other roads in the district.

Therefore, where a colliery company, in carrying on their business, which was the staple trade of the district, caused to be conducted on a road traffic which was extraordinary as compared with the ordinary traffic of that road:—

Held, that such traffic was rightly determined by magistrates to be "extraordinary traffic" within the section, although other coal-owners ordinarily used other roads in the district for similar purposes.

Hill v. *Thomas* ([1893] 2 Q. B. 333) followed.

APPEAL from the judgment of a Divisional Court (Lord Coleridge, C.J., and Cave, J.) upon a special case stated by

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magistrates under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, s. 33.

The facts so far as material to this report were as follows:—

The appellants, who were colliery proprietors, were summoned before magistrates in petty sessions upon the complaint of the respondents, who were the highway board of the highway district of Auckland in the county of Durham, and who claimed to recover from the appellants a sum of 25*l.* for "extraordinary expenses" incurred by the respondents in repairing a certain highway in their district by reason of damage caused by "extraordinary traffic" conducted on such highway by order of the appellants. It appeared that the coal trade was the staple trade of the district. The appellants had carted coal from their colliery to a railway siding along the road in question for a period between March 25, 1890, when the appellants' colliery was opened, and March 25, 1892, and were continuing to do so. The surveyor of the respondents, who were the local authority liable to repair the road, had, on October 3, 1892, given a certificate in the terms required by the Highways and Locomotives (Amendment) Act, 1878, s. 23, that extraordinary expenses had been incurred by the respondents in repairing the road from the appellants' colliery to the siding for the period between March 25, 1890, and March 25, 1892, to the extent of 25*l.* It was proved that from 1887 to 1890 one portion of the road used for cartage of coal by the appellants as before mentioned did not cost more than 10*l.* per mile per annum, and the other portion of such road did not cost more than 15*l.* per mile per annum, the traffic on the latter portion being more than on the former, whereas for the period from March 25, 1890, when the appellants began to cart coals along the road, to March 25, 1892, the cost of such road was not less than at the rate of 45*l.* per mile per annum, and that the cost of repairing the highways in the neighbourhood was not more than 20*l.* per mile per annum. The magistrates found that the cause of the increased cost of repairing the highway in question was the traffic conducted by order of the appellants in carting coals from their colliery to the railway siding.

It appeared that prior to 1890 the road had been only used for ordinary agricultural traffic and ordinary light traffic, and a little

"land-sale" coal traffic (1), and that it had not been adapted or made up to bear traffic of such a description as that conducted upon it by the appellants' orders.

During the year beginning March 25, 1890, the appellants carted 10,532 tons of coal from their colliery to the siding, and during the following year 9490 tons. The weights carried upon the appellants' carts were from 20 to 25 cwt., being about 7 cwt. heavier than would be put on an ordinary land-sale cart.

Evidence was called by the appellants to shew that other coal-owners in the district had been accustomed to carry and still carried coals in carts to railway stations. The magistrates found upon the evidence before them as to the nature and extent of the traffic conducted upon the road in question by the appellants' orders, that, with reference to the ordinary user of the road, such traffic was "extraordinary traffic," and that, having regard to the average expenses of repairing highways in the neighbourhood, "extraordinary expenses" had been incurred by the respondents in repairing the road by reason of damage caused by such extraordinary traffic, to the extent of 25*l.*, which sum they ordered the appellants to pay to the respondents.

The question for the Court was whether the magistrates under the circumstances had power to make the order which they had made.

The Divisional Court affirmed the decision of the magistrates.

H. Manisty, for the appellants. The case states that the coal trade was the staple industry of the district, and evidence was given to the effect that roads in the district other than the road in question were used by coal-owners for the cartage of coals from their collieries to railway stations. It must be admitted that, if the terms of the rule laid down by the Court of Appeal in *Hill* v. *Thomas* (2) are to be considered as absolutely exhaustive and not subject to any qualification, the traffic in this case would be "extraordinary traffic" within the Act, because, no doubt, the terms of the judgment in that case indicate that the standard of comparison by which to estimate what is

(1) This was stated to mean traffic in coal for sale locally.

(2) [1893] 2 Q. B. 333.

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"extraordinary traffic" is the ordinary traffic on the particular road in question. But it is submitted that it was not intended to lay this down as an absolute rule applicable to all cases without exception. *Hill* v. *Thomas* (1) was not the case of a man carrying on a staple industry of the district. The traffic there in question was temporary, exceptional traffic caused by the carriage of materials by contractors for the purpose of erecting a fort for the Government. It is submitted that, in a case where a person is carrying on the ordinary trade of the district and is only using his highway in the manner in which other persons, carrying on the same trade in the district, are using their highways, he cannot be said to be carrying on "extraordinary traffic." In such cases, in considering what is extraordinary traffic, reference should be made not merely to the ordinary traffic on the particular road, but to the ordinary traffic on other roads in the district. The magistrates here have clearly looked only to the previous user of this particular road; they should have considered the case with regard to the user of other roads. A person ought to be entitled to a reasonable user of the highway for the purposes of his trade: and it is laid down in *Hill* v. *Thomas* (1) that the mere fact of a person's using it for such purposes more than others does not constitute "extraordinary traffic." If the result of the decision in *Hill* v. *Thomas* (1) is that the comparison can only be with the ordinary traffic of the particular road, no allowance is made for the expansion of trade in a district. It would be very unfair that on one road, which had not happened to be previously used for the purposes of a staple industry of the district, the person carrying on such industry should bear a special burden not borne by those carrying on the same industry on other roads. The colliery-owner is rated in proportion to the output of his colliery, and contributes on that footing to the rates; if he has to bear the whole of the expense of the repairs necessitated by his use of the highway, he will be charged twice over and bear more than his share of the highway expenses.

By s. 23 the standard of comparison by which to determine what are "extraordinary expenses" is the average expense of repairing, not the particular road, but the highways in the neigh-

(1) [1893] 2 Q. B. 333.

bourhood. The same principle ought to apply in determining what is extraordinary traffic.

[He also cited *Reg.* v. *Williamson* (1); *Wallington* v. *Hoskyns.* (2)]

Lawson Walton, Q.C., and *Simey*, for the respondents, were not called upon.

LORD ESHER, M.R. It is not disputed that this case will be governed by *Hill* v. *Thomas* (3) unless the decision in that case must be treated as qualified by the proposition put forward for the appellants, to the effect that traffic, which is of such an extent and nature as to be extraordinary in comparison with the ordinary traffic on the road in question, is, nevertheless, not "extraordinary traffic" within the meaning of the statute, if it can be shewn that it is traffic of such a nature as is ordinarily conducted on other roads in the district. Unless that qualification can be grafted on to the decision in *Hill* v. *Thomas* (3), this case is governed by that decision. In my opinion, the proposition so put forward is directly in the teeth of the judgment in *Hill* v. *Thomas* (3), which appears to me distinctly to hold that the ordinary traffic on the particular road in question must be looked to, in order to see whether the traffic is extraordinary, and that it is none the less extraordinary with regard to that road, because it would be ordinary traffic on another road. For these reasons, I think the appeal must be dismissed.

LOPES, L.J. This case seems to me clearly to be governed by the decision in *Hill* v. *Thomas.* (3) I must say that I do not think I should myself have decided that case on the same lines as those on which this Court there proceeded. I am disposed to think that the standard of comparison ought not to be merely the ordinary traffic on the particular road, but that the traffic on other roads in the same district ought to be taken into consideration. The Court of Appeal, as constituted in that case, appear, however, to have thought differently, and I bow with all loyalty to their decision. I have only one other observation to make. Lord Justice Bowen must in that case have misunderstood my meaning, when he said that I assumed that the object

(1) 45 J. P. 505. (2) 6 Q. B. D. 206.
(3) [1893] 2 Q. B. 333.

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of the legislature was to prevent extraordinary traffic, for I must say that such an idea never entered my mind.

KAY, L.J. I agree with the rest of the Court that this case cannot be distinguished from *Hill* v. *Thomas*. (1) In that case an interpretation was put upon the term "extraordinary traffic." We find in the judgment (2) these words: "If so, extraordinary traffic is really a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road and to cause damage and expense thereby beyond what is common." In this case we have a by-road, on which there was some "land-sale" coal traffic, but with that exception the traffic was only the ordinary agricultural traffic. Then the appellants opened a colliery on that road and conveyed all the coal which constituted the output of the colliery down the road to a railway siding, thereby subjecting the portion of the road between the colliery and that siding to an amount and kind of traffic to which it had never been subject before. The question is whether that is extraordinary traffic within the meaning of the statute. According to the terms of the judgment in *Hill* v. *Thomas* (1)—which being a decision of the Court of Appeal is binding on us in this case, and with which I need hardly say I entirely agree, having been a party to it—"extraordinary traffic" means something which goes beyond the ordinary user of the particular road. The main argument here has been that, although this particular road, until the appellants' colliery was opened, never was used for any traffic of the kind for which the appellants used it, still on other roads in the immediate neighbourhood there has been such traffic, coal having been carted on such other roads to railway stations; and, therefore, that it must be taken that this is the ordinary trade of the neighbourhood, and the use of a road for the ordinary trade of the neighbourhood cannot constitute "extraordinary traffic." It seems to me that this very point was decided by *Hill* v. *Thomas*. (1) That case appears to me to decide that, in determining whether there has been extraordinary

(1) [1893] 2 Q. B. 333. (2) [1893] 2 Q. B. 340.

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traffic, regard must be had, not to all the roads in the neighbourhood, but to the particular road in question. If that road has been damaged by any person by traffic beyond its ordinary traffic, that person must pay for the damage. As Bowen, L.J., put it in *Hill* v. *Thomas* (1), "the object of the section is not to prohibit extraordinary traffic, but to lay the extra expense of damage done by such traffic to the road on the right shoulders, viz. upon those who caused the damage and to whose benefit it enured." For these reasons I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Field, Roscoe & Co., for Maw, Teale, & Thomlinson, Bishop Auckland.*

Solicitors for respondents: *Tarry & Sherlock, for Trotter, Bruce, & Trotter, Bishop Auckland.*

E. L.

[IN THE COURT OF APPEAL.]

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THE TAFF VALE RAILWAY COMPANY *v.* DAVIS & SONS, LIMITED.

Railway Company—Construction of Special Act—Enactment as to Rate at which one Company shall forward Traffic of Another—Duty created towards other Company, not towards the Public.

Where by a section in the special Act of railway company A., to whom power was given to effect a junction with the line of railway company B., it was provided that the latter company should charge for traffic on their line destined for or coming from the line of company A. at a rate per mile not greater than the lowest rate charged by them for like traffic to or from certain places on their line, such provision appearing from the context and the circumstances to be intended by the legislature solely for the protection of the interests of company A. as against company B.:—

Held, that such provision created no duty other than to company A., and therefore colliery owners, for whom company B. had carried coal on their line destined for the line of company A., could not set up, by way of defence to an action for charges made by company B. in respect of such carriage which were within the maximum rate authorized by the Acts of that company, that such charges were in excess of the rate mentioned in the above-mentioned provision.

APPEAL from the judgment of Day, J., at the trial before him without a jury.

(1) [1893] 2 Q. B. 333.

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The action was brought to recover, inter alia, rates and tolls for the tonnage of goods carried for the defendants on the plaintiffs' railway.

By the statement of defence, as to so much of the plaintiffs' claim as related to the rates charged per mile by the plaintiffs for forwarding or affording facilities for goods and mineral traffic destined for or coming from the undertaking of the Barry Dock and Railways Company, and consigned by or coming to the defendants viâ Hafod Junction, the defendants craved leave to refer to s. 23 of the Barry Dock and Railways Act, 1888 (51 & 52 Vict. c. clxxxii.), and said that the plaintiffs in their said claim and in the account or particulars delivered therewith had not charged the defendants at rates per mile not greater than the lowest rate for the time being charged by them for like traffic to or from the docks at Cardiff, Penarth, or Barry, according to the true intent and meaning of the said statute, but instead thereof had charged and were claiming from the defendants rates and charges in excess of the said statutory rates. Money was paid into Court to an amount which the defendants alleged to be that which was due in respect of the carriage of such goods and minerals, having regard to the provisions of the section above referred to.

The facts so far as material to this report were as follows:—

The plaintiffs were a railway company called the Taff Vale Railway Company, incorporated by Act of Parliament, branches of whose railway ran from Merthyr Tydfil and the Rhondda Valley in South Wales to the docks at Cardiff and Penarth. They were authorized by their special Acts to make charges for the carriage of goods on such branches not exceeding certain maximum rates specified. The Barry Dock and Railways Company were incorporated by the Barry Dock and Railways Act, 1884, and by their special Acts were authorized to make a new dock at Barry, and a railway to such dock communicating with the above-mentioned branches of the Taff Vale Railway Company at junctions called Hafod and Treforest. The Taff Vale Railway Company were able by means of a railway constructed under the provisions of the Cardiff, Penarth, and Cadoxton-juxta-Barry Junction Railway Act, 1885, to run to

Cadoxton Junction, which was close to the Barry Dock; but that route was a circuitous one as compared with the route to that dock by the Barry Dock and Railways Company's line. By the Barry Dock and Railways Act, 1888 (51 & 52 Vict. c. clxxxii.), s. 23, it was provided as follows:

"(1.) The Taff Vale Railway Company shall punctually and regularly forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the Company (i.e. the Barry Dock and Railways Company) from or to Treforest or any place northward thereof, at rates per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Company for like traffic to or from the docks at Cardiff, Penarth, or Barry, and shall deliver all such traffic into and take the same from the company's sidings as regards all traffic coming from or destined for Hafod or any place westward thereof at Hafod, and as regards other traffic at Treforest, without any terminal or other charge in respect thereof, but with such bonus (if any) in respect of traffic exchanged at Hafod as in default of agreement between the Taff Vale Railway Company and the Company shall be from time to time determined, on the application of either of them, by the Railway Commissioners sitting as arbitrators, having regard to all the circumstances of the case and to the following proviso: Provided that, where any such traffic shall be carried on the Taff Vale Railway for a less distance than four miles, the Taff Vale Railway Company shall be entitled to charge in respect of such traffic as if it were carried on their railway for a distance of four miles, and the Company shall in all respects be placed on at least as favourable a footing as any other company with regard to traffic exchanged with the Taff Vale Railway Company.

"(2.) The Taff Vale Railway Company shall not (except with the consent of the Company under their common seal) use the railway authorized by the Cardiff, Penarth, and Cadoxton-juxta-Barry Junction Railway Act, 1885, for mineral traffic other than local traffic.

"(3.) If at any time, on application made by the Company to the Railway Commissioners sitting as arbitrators, the said

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commissioners shall decide that the Taff Vale Railway Company have failed to give any of the facilities herein provided for, and shall not within reasonable time after notice have remedied such failure, or, if the Taff Vale Railway Company use the Cardiff, Penarth, and Barry Railway contrary to the provisions of this Act, or in case the Cardiff, Penarth, and Barry Junction Railways Company shall use, or permit to be used, their railway for the conveyance of mineral traffic other than for local traffic, then the Company may run over and use with their engines, carriages, and waggons, and officers and servants, whether in charge of any engines or trains, or for other purposes, and for the purposes of their traffic of every description, the railways and stations following [specifying certain portions of the Taff Vale system]. Provided always that, if and whenever the Company shall exercise the running powers by this section conferred, the Taff Vale Railway Company shall, during the period of such exercise, be relieved and discharged from any obligations under this section to deliver traffic to the Company at Hafod or Treforest, and from any restrictions as to the use of the Cardiff, Penarth, and Barry Railway."

It appeared that by the bill of 1888 as originally promoted by the Barry Dock and Railways Company, running powers were sought by that company over (amongst other branches of the Taff Vale Railway) the Rhondda Valley branch by way of Hafod Junction. The powers so applied for were not however granted, but it was arranged that s. 23 should be inserted in the Act instead of such powers by way of protection to the Barry Dock and Railways Company. The defendants were the proprietors of the Ferndale Collieries, which were situated on the Rhondda Valley branch of the Taff Vale Railway. The rates demanded by the plaintiffs from the defendants in their claim were for the carriage from the defendants' collieries to Hafod Junction of coal destined for the Barry Dock and Railways Company's line and were within the maximum rates authorized by the Taff Vale Railway Company's Acts; but it was contended by the defendants that they were in excess of the rates authorized by the 23rd section of the Barry Dock and Railways Act, 1888, above mentioned. As will be seen, it became unnecessary for

the Court of Appeal to determine the question whether this was so.

Day, J., held, that, s. 23 being a clause inserted for the protection of the Barry Dock and Railways Company only, it imposed no obligation on the plaintiffs so far as the defendants were concerned, and that the plaintiffs were entitled to judgment for the charges in question.

Sir R. E. Webster, Q.C., and *Moulton, Q.C.*, *Robson, Q.C.*, and *J. Shaw* with them, for the defendants. Sect. 23 of the Barry Docks and Railways Act, 1888, is a distinct enactment that the plaintiffs shall not charge more than a certain rate with regard to certain traffic, and it must be taken to that extent to repeal or modify the provisions of the plaintiffs' Acts as to the maximum rates which they may charge. An Act of Parliament is not like a contract made between parties, and, if a provision has been enacted which benefits the public, no matter at whose instance or for whose benefit it was originally enacted, the public are entitled to enforce it. The Court cannot look to collateral circumstances such as the position of the parties and what took place before the committee that sat on the bill in order to construe an Act of Parliament such as this. It must look to the words of the enactment themselves in order to construe it. It is not to be assumed that the legislature inserted s. 23 for the benefit of the Barry Dock and Railways Company only, and that they were not considering the public. It was in the interest of the public that there should be competition and alternative routes to the coast, and the clause was inserted to prevent the Taff Vale Railway Company from crippling the Barry Dock and Railways Company by not giving due facilities to or overcharging traffic destined for or coming from their undertaking. Therefore the public are interested in enforcing s. 23.

Assuming that the section was enacted by the legislature with a view to the interests of the Barry Dock and Railways Company, that does not prevent a member of the public who is bonâ fide interested from enforcing it. The best way of protecting the Barry Dock and Railways Company would be to prohibit the Taff Vale Company from charging as against the public more

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than the specified rate. [They cited *Guardians of Holborn Union* v. *Vestry of St. Leonard's, Shoreditch.* (1)]

Balfour Browne, Q.C., and *Noble*, for the plaintiffs. The public really have no interest in the provisions of s. 23. It deals with a matter in which the two companies inter se are solely interested. It cannot be supposed that the section was inserted in the interests, or was intended for the protection, of persons in the position of the defendants, who are colliery proprietors on the line of the Taff Vale railway, because they would have no locus standi before the committees before whom the Barry Dock and Railways Company's bill came in 1888. It was a mere matter of stipulation between the companies. The company promoting the bill were asking for running powers over the Taff Vale Railway Company's line. The Taff Vale Railway Company were opposing before the Committee. The running powers asked for were not given, but this section was inserted by way of protection to the Barry Dock and Railways Company against obstacles being thrown by the rival company in the way of traffic to and from their system. The provisions of sub-ss. and 3 of the section shew the scope of it. For, if the Taff Vale Railway Company choose not to carry out the terms of sub-s. 1, and the Railway Commissioners decide that they have failed to do so, or if they contravene sub-s. 2, the Barry Dock and Railways Company will have running powers over their line, and the restrictions contained in sub-ss. 1 and 2 will be at an end. The public are sufficiently protected without sub-s. 1 of s. 23. The coals from the defendants' collieries could be carried by the Taff Vale Railway to the Barry Dock, though by a somewhat circuitous route. Consequently, the effect is that there are alternative routes, and there will be competition. One company could not charge a larger gross rate than the other, or else all the traffic would go by the other line. It is a mere question into which company's pocket the money goes. The public will pay no more in any case. In dealing with an enactment in a special Act such as this, it must be a question, depending on the circumstances existing at the time of the passing of the Act, the position of the parties, the practice of the committees in relation to such

(1) 2 Q. B. D. 145.

bills, and other such matters, towards whom a clause like this was intended to create an obligation or duty; and it is clearly the law that only those towards whom the duty was intended to be created can take advantage of it. The public have nothing to do with the provisions of s. 23, which is merely a private arrangement between the two companies who were respectively promoting and opposing the bill.

Moulton, Q.C., in reply. Nothing that has been said alters the fact that this section contains a positive enactment which gives an interest to the public. It is not a material question who had a locus standi or who was interested at the time of the passing of the enactment. When by the words of an enactment it is clearly stated that such a thing may not be done, it is immaterial what persuaded the legislature to pass the enactment. The section distinctly imports that the Taff Vale Railway Company shall not charge more than a certain rate.

LORD ESHER, M.R. I am of opinion that this appeal fails. The only question with which it is necessary for us to deal is whether the defendants are entitled to set up the defence upon which they rely. The case appears to stand thus. The Taff Vale Railway Company was empowered by Act of Parliament to make a railway for the purpose, among other things, of bringing coal from the Merthyr and Rhondda Valley districts to the sea at Cardiff; but the carriage of coal upon it from those districts was of course not necessarily confined to carriage to Cardiff; it might be to intermediate places. For such carriage the company were empowered by their Acts to charge mileage rates, according to the distance for which the coal was carried, within a certain maximum, which was imposed by way of a limitation to protect colliery owners and the public from unreasonable charges. Subject to such limitation, the enactment is an empowering enactment which empowers the company to enforce the maximum rate. The colliery owners, therefore, on the Taff Vale Railway system above the stations of Hafod and Treforest, if they desired it, could have coals carried from their collieries to either of those stations, and in respect of the carriage of such coals the Taff Vale Railway Company were entitled to charge them at the

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maximum rate according to the distance from the particular colliery to the station. In the present case the Taff Vale Railway Company have carried coals for the defendants from their colliery to Hafod, and, unless something has interfered with the provisions of their Act, to which I have referred, the company have a right to charge for such carriage the maximum rate per mile authorized to be charged by such provisions, and the only protection to which the defendants are entitled is that given by such maximum. Then, has anything happened which has taken away in favour of the defendants the company's power to charge and the defendants' obligation to pay such maximum rate?

It is said that there is something in an Act promoted and obtained by the Barry Dock and Railways Company, whose railway does not and cannot carry coals from the defendants' colliery to Hafod, which has taken away the power of the Taff Vale Railway Company, upon whose railway such coals have been carried, to charge the defendants the rates authorized by their Act to be charged upon their railway. There is nothing in the Barry Dock and Railways Act which expressly interferes with the right given by their Act to the Taff Vale Railway Company to charge the maximum rate authorized by that Act, or the obligation imposed upon the defendants to pay such rate. Therefore, the defendants must shew that such right with the corresponding obligation is interfered with or altered by necessary implication. Does, then, a necessary implication arise from the terms of the Barry Dock and Railways Act, 1888, that it has altered the enactments in the Taff Vale Railway Company's Acts under which that company would be entitled to charge and the defendants would be obliged to pay the rates claimed in this action?

The Barry Dock and Railways Company is a wholly distinct company from the Taff Vale Railway Company. The latter had granted to it by parliament the right to make a railway on certain terms, and at that time no such scheme as that of the Barry Dock and Railways was contemplated. One of the terms on which the Taff Vale Railway was made was that the Taff Vale Railway Company should have a right to charge for the carriage of coals without any fetter beyond that imposed by the maximum

then fixed. The Barry Dock and Railways Company subsequently obtained an Act of Parliament which enabled them to make a railway beginning at Hafod and Treforest stations, and proceeding thence to the coast at Barry; and it is argued that the Act authorizing the construction of that railway has imposed on the Taff Vale Railway Company a duty to the owners of collieries with regard to the carriage of coals, not on that railway, but on their own railway, before it reaches the Barry Dock Railway, and that it has altered the power of charging rates which was given to the Taff Vale Railway Company by their own Acts, and the corresponding obligation to pay such rates imposed by those Acts on persons whose coals are carried on their railway. I think it would need strong words to lead one to suppose that it was the intention of parliament by the 23rd section so to interfere with the terms contained in the Taff Vale Railway Company's Acts, and to impose on that company a duty or obligation towards colliery owners whose coals are carried on their railway before it reaches the Barry Dock Railway, which would have the effect of restricting or limiting in favour of such colliery owners the power of charging rates given to the Taff Vale Railway Company by their Acts. We were told by the counsel for the defendants that, when we found something stated in an Act of Parliament, we had no right to look at the circumstances under which the Act was passed and which were before parliament when it was being considered; that, although in construing a contract the circumstances under which it was made must be considered, that could not be done in regard to this Act of Parliament. I entirely disagree with that proposition. It seems to me that in construing such an Act as this we must apply the same rules of construction in this respect as in the case of a contract, and that the words cannot properly be construed without considering the circumstances under which they were used. The Barry Dock and Railways Company were asking for leave to make a railway joining the Taff Vale Railway, and they desired, on what terms it is unnecessary to inquire, to have running powers over that already existing railway. The Taff Vale Company might well object to a strange company having the power of coming on their line. I suppose that any

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railway company primâ facie would object to another company having such a power, and parliament would not grant it unless there were special grounds for so doing. If the Barry Dock and Railways Company had running powers on the Taff Vale Railway before it reaches Hafod or Treforest, so far as concerns the defendants' collieries and other places up to the top of the Rhondda Valley or Merthyr, it would practically be giving them a railway all the way from thence to the coast. Parliament declined to do this. Then they ask to be given some protection from interference by the Taff Vale Railway Company that may prevent them from getting the full benefit which parliament means them to obtain by the Act. Are we to shut our eyes and not to consider whether that demand was made by the Barry Dock and Railways Company for the benefit of the company? I deny that. I think we must consider the circumstances under which such a clause was inserted. Unless one wilfully shuts one's eyes, one must see that persons in the position of the defendants could not be heard before the committee on such a matter as this. The only people who could be heard were the companies, and the only ground on which parliament could properly insert such a clause as this would be that the Barry Dock and Railways Company had been able to shew that, unless such a provision was inserted, they would be exposed at the hands of the Taff Vale Railway Company to some inconvenience to which parliament did not mean them to be exposed. It seems to me that this clause was inserted solely on the application of the Barry Dock and Railways Company for the protection of their own interest. They had no right to assume to be the guardians of the public interest, and to suppose that they got this clause inserted out of philanthropy by way of protecting the coal-owners or the public is absurd. They asked for it in their own interest; and I think we must take it that what parliament was considering when they inserted it was the interest of the Barry Dock and Railways Company. When I look at s. 23 by the light of these considerations, so far from its giving rise to a necessary implication that it takes away the power of the Taff Vale Railway Company to charge the maximum rates authorized by their Acts as against the colliery owners, the

reasonable implication seems to me to be that it has no regard to the interest of the colliery owners at all. The section did impose a duty to or in respect of the Barry Dock and Railways Company; but the only duty imposed by it is as between the two companies. The only person who can insist on the performance of such a statutory duty, according to the principles of law, is the person towards whom it is a duty. Therefore, if it is only a duty to the Barry Dock and Railway Company, they alone can insist upon it in a Court of law. They are not parties to this action. Therefore the defence has no legal ground. As far as the defendants are concerned, the plaintiffs are only under the obligation not to exceed the maximum rate authorized by their Act, and this they have not done. For these reasons the appeal must be dismissed.

LOPES, L.J. I am of the same opinion. The determination of this case depends on the construction to be put on s. 23 of the Barry Dock and Railways Act. It is said, on the one hand, that it confers rights on the public which they are entitled to enforce against the Taff Vale Railway Company. On the other hand, it is argued that it confers no such rights on the public, but only applies as between the two companies; that it is a clause inserted for the protection of the Barry Dock and Railways Company only. The latter construction appears to me to be the correct one. The Taff Vale Railway Company under their Act are entitled to charge the public such rates as they think fit, provided they do not exceed a certain maximum rate. In the present case their charges are within such maximum. It was contended for the defendants that it was clear upon the true construction of s. 23 that it repealed or modified the provisions of the Taff Vale Railway Company's Act as to rates. I cannot so read the section. I see nothing in it which repeals or modifies those provisions. It appears to me that the true construction of the section is that which has been adopted by the Master of the Rolls and by the learned judge in the Court below. I have only one other observation to make, viz., that I cannot assent to the contention of the defendants' counsel to the effect that, in construing an Act of Parliament such as the

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Barry Dock and Railways Act, the Court must not look at the surrounding circumstances, the position of the parties concerned, and other such matters which existed at the time when the Act was passed. I am clear that that is not the true view. I think that the same principle applies as in the case of a contract where, though the Court is not entitled in construing the contract to look at any negotiations which may have taken place beforehand, they may look at the surrounding circumstances and other matters which existed at the time of the making of the contract.

KAY, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Ince, Colt, & Ince, for Ingledew & Sons, Cardiff.*

Solicitors for defendants: *Downing & Co., for Downing & Handcock, Cardiff.*

E. L.

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[IN THE COURT OF APPEAL.]

DANE *v.* THE MORTGAGE INSURANCE CORPORATION, LIMITED.

Insurance of Securities—Contract to Insure Payment of Sum deposited with Bank—Contract whether of Suretyship or Insurance—Scheme of Arrangement between Bank and Creditors—Statutory Discharge—Surety, Discharge of—Accord and Satisfaction.

By an instrument purporting to be a "policy of insurance," it was witnessed that the defendants guaranteed to the "assured," the plaintiff, payment of a sum of money deposited by her in a bank in Australia, if the bank should make default in paying the same. The bank made default in payment of the sum deposited. Subsequently to such default a scheme of arrangement between the bank and its creditors was, under the provisions of a statute of the colony, sanctioned by a meeting of creditors and the colonial Court. By this scheme the bank was to be wound up and a new bank constituted, the creditors becoming entitled to certain rights against the new bank in satisfaction of their debts. The plaintiff did not assent to this scheme, which, however, was binding upon her by the colonial statute:—

Held (affirming the judgment of the Queen's Bench Division), that the defendants remained liable to the plaintiff under their contract notwithstanding the scheme of arrangement.

By Lord Esher, M.R., and Lopes, L.J.: The contract was upon its true construction one of insurance against a certain event, viz., the bank's default, and, that event having happened, the defendants were liable to pay the sum

insured, but would be entitled, the contract being one of indemnity, upon payment to be subrogated to the rights of the plaintiff under the scheme of arrangement.

By Kay, L.J.: Whether the contract was one of suretyship or one of insurance, the scheme of arrangement, which operated to discharge the bank under the statute and not by way of accord and satisfaction, did not defeat the right which had vested in the plaintiff under the contract upon the default made by the bank.

APPEAL from the order of a Divisional Court (Pollock, B., and Kennedy, J.), reversing the order of a judge at chambers and giving leave to the plaintiff to sign judgment under Order XIV., r. 1.

The facts were as follows. The action, which was commenced on July 26, 1893, was to recover a sum of 1000*l.* and interest upon a contract made between the plaintiff and the defendants, which, so far as material, was in the following terms.

It was headed, "The Mortgage Insurance Corporation, Limited." Then followed the address of the company and the names of the directors. The document then proceeded thus:—

"This policy of insurance witnesseth that, whereas Mrs. Jessie Dane, of &c., who with her executors, administrators, and assigns is hereinafter called 'the assured,' is the holder of a deposit receipt for 1000*l.* of the Commercial Bank of Australia, Limited, hereinafter called the 'debtors,' bearing interest at the rate of 4*l.* 5*s.* per cent. per annum and numbered 6400, and the said assured is desirous of being insured by the above-named corporation as hereinafter appearing, and there has been paid to the corporation the sum of 1*l.* 3*s.*, being the agreed premium for such assurance until the 25th March, 1891, and the sum of 1*l.* 5*s.* is the agreed annual premium for the said assurance after the said 25th March, 1891, and is to be payable on the 25th March in each year; Now, therefore, these presents witness that the corporation do hereby guarantee to the assured the payment of the said principal sum of 1000*l.* and interest in manner following, namely: (1.) The corporation will pay to the assured any interest on the said principal sum which the debtors shall not pay for sixty days after the day when the same shall become payable thereunder. (2.) The corporation will pay to the assured the said principal sum if the debtors shall have made

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default in paying the same. (3.) Any principal money payable under this policy will be paid within three calendar months after notice in writing from the assured to the corporation, requiring the corporation to pay the same and any interest payable under the policy will be paid within one calendar month after notice in writing from the assured to the corporation to pay the same. This policy is issued subject to the conditions indorsed hereon which are to be deemed part of it."

Among the conditions were the following: "(1.) This policy will be void (*a*) If the proposal dated the 23rd April, 1890, on the basis of which the policy is effected, contains any material statement untrue to the knowledge of the assured, or fails to disclose any material fact within her knowledge; (*d*) if the assured without the consent in writing of the corporation consents to any arrangement modifying the rights or remedies of the assured against the debtors.

"2. If the debtors make default in paying any principal or interest for sixty days after the same ought to be paid, or if the corporation is called upon to pay any money under this policy, the assured shall at the request and costs of the corporation give to the corporation all such information as she may possess, and the corporation may require as to the issue of the said deposit receipt and the circumstances under which she took out the same and the securities and rights available to the assured, and shall also, at the like request and costs, and upon payment by the corporation of the principal remaining due upon the deposit receipt and interest to date of payment, execute and do all such assurances and things as may be required by the corporation for vesting in them all rights of the assured against the debtors and any property or person whatsoever, and the corporation may enforce any such rights or remedies in the name of the assured but at the costs of the corporation. If the assured shall refuse or neglect to execute or do any such assurance or thing for twenty-one days after being required by the corporation to execute or do the same, all the rights of the assured under this policy shall forthwith cease."

By the terms of the deposit receipt the sum deposited by the plaintiff was repayable on April 19, 1893, with 18*l.* for interest;

but it was not paid, the bank having stopped payment on April 4, 1893.

On April 24, notice was given by the plaintiff to the defendants that default had been made in payment of such deposit receipt.

It appeared from the affidavits filed for the defendants that the Commercial Bank of Australia was a company formed under and according to the law of the colony of Victoria, in Australia, where it carried on its business and its principal offices were situated, though it had offices in this country. On its suspending payment an order was made by the Supreme Court of Victoria on April 26, 1893, sanctioning a scheme of compromise or arrangement with the creditors of the bank pursuant to the Victorian Act, intituled the Companies Act Amendment Act, 1892; and on April 28, 1893, an order was made by the same Court for winding up the company. A meeting of creditors of the bank, held by order of the Court pursuant to the above-mentioned Act, duly agreed to and sanctioned the scheme of compromise or arrangement. The Court of Appeal of the colony sanctioned the scheme on appeal upon June 19, 1893.

On May 18, 1893, an order for winding up the bank was made by the Chancery Division of the High Court of Justice in England, and on July 28, 1893, the Chancery Division ordered a meeting of creditors to be held under the Joint Stock Companies Arrangement Act, 1870, which meeting was held on August 4, 1893, when the scheme was agreed to by the meeting, and in the manner required by the said Act. On August 10, 1893, an order was made in the Chancery Division sanctioning the scheme. The plaintiff had been summoned to attend the several meetings aforesaid, and it was alleged by the defendants that the said scheme was under the orders of the colonial Court, and the orders of the Chancery Division binding upon the plaintiff. The plaintiff had not assented to the scheme.

The provisions of the scheme of arrangement (so far as material) were as follows. The existing company was to be wound up voluntarily, and a new company formed to take over their assets and business. The creditors of the old company, except Her Majesty's Government and the holders of the bank-notes of the old company (who were preferential creditors), were

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to be entitled respectively to receive the deposit receipts of the new company for two-thirds (as nearly as practicable) of the amount of principal owing to such creditors by the old company. Such deposit receipts were to bear interest at the rate of interest (if any) then payable up to the time when the principal was payable by the old company, and thereafter at the rate of 4½ per cent. per annum, payable half-yearly, and the principal amounts of such deposit receipts were to be payable at the expiration of five years from the date when they were payable by the old company. The creditors of the old company, except as aforesaid, were also to be entitled to receive preference shares in the new company, credited as fully paid-up, equal in nominal value to the balance of principal not provided for as aforesaid. The creditors of the old company, except as aforesaid, were to accept the provisions made for them as before mentioned in satisfaction and discharge of all claims against the old company.

The plaintiff applied at chambers for leave to sign judgment in the action under Order XIV., rule 1. The master granted the application; but on appeal the judge at chambers gave the defendants leave to defend on certain terms. On appeal from the judge the Divisional Court reversed his order and granted the plaintiff's application. (1)

(1) By the Victorian Act intituled the Companies Act Amendment Act, 1892, s. 3, it is in substance provided that, where any compromise or arrangement is proposed between a company which is in the course of being wound up and its creditors, the Court may order that a meeting of such creditors shall be summoned, and, if a majority in number representing three-fourths in value of such creditors, present either in person or by proxy or attorney at such meeting, shall agree to any arrangement or compromise, it shall, if sanctioned by an order of the Court, be binding on all such creditors, and also on the liquidators and contributories of the company. By s. 4 it is provided in substance that, where no order has been made or resolution passed for the winding up of a company, and any compromise or arrangement is proposed between such company and its creditors, the Court may restrain further proceedings in any action, suit, petition, or proceeding against the company on such terms as it shall think fit, and order a meeting of creditors to be summoned, and, if a majority representing three-fourths in value of such creditors, present at such meeting, shall agree to any arrangement or compromise, it shall, if sanctioned by the Court, be binding upon the company and its shareholders and all such creditors.

Moulton, Q.C., and *Danckwerts*, for the defendants. The contract between the plaintiff and the defendants is substantially one of guarantee or suretyship. Any arrangement between the creditor and the principal debtor by which the original debt is discharged releases the surety. Here the plaintiff, by virtue of the scheme of arrangement under the colonial law, took new rights against the reconstituted banking company in satisfaction of her debt and in lieu of the rights she had under her contract with the old banking company. There has, therefore, been an exoneration of the debtors by accord and satisfaction, and the sureties are discharged. As the plaintiff contracted with an Australian company, she must be taken to have known that by the colonial law such an arrangement as this might be made by a majority of creditors, and it must be taken to have been a term of the contract that, if such an arrangement were made, she should accept it in lieu of payment of the deposit. The contract, therefore, contemplated the satisfaction of the liability of the bank either by payment or by such an arrangement; and in either case the liability of the bank comes to an end, and therefore the defendants are not liable. The liability of the defendants is only to arise after the expiration of three months' notice. The arrangement took place before the expiration of that notice, and therefore no right of action ever vested in the plaintiff. In the case of bankruptcy, the Bankruptcy Acts have always been so framed as to prevent the discharge of the insolvent debtor from releasing the solvent co-debtor. The discharge under the bankruptcy law is only personal to the bankrupt, and does not destroy the debt as against other persons liable. In this case the original debt is destroyed by the arrangement. [They cited *Megrath* v. *Gray*. (1)]

Channell, Q.C., and *A. J. Walter*, for the plaintiff. In this case the bank had already made default, so far as the plaintiff was concerned, before the scheme of arrangement was entered into. Thereupon the plaintiff acquired a vested right under the policy executed by the defendants. The subsequent making of the scheme of arrangement did not divest that right. The plaintiff never assented to the arrangement or in any way waived

(1) Law Rep. 9 C. P. 216.

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her rights. The authorities are clear to the effect that a discharge of the principal debtor by operation of law, as in the case of a bankruptcy or composition under the Bankruptcy Act, does not release the surety: *Ex parte Jacobs, In re Jacobs.* (1) Such a composition is not equivalent to a voluntary accord and satisfaction at common law: *Slater* v. *Jones.* (2) This very point was considered in *In re London Chartered Bank of Australia* (3) by Vaughan Williams, J., who thought that such a scheme of arrangement as this would not discharge sureties. It is clear from condition 2 indorsed on the policy that the parties contemplated the very case that has arisen, and intended that in that case the defendants should pay and take an assignment of the plaintiff's rights under the arrangement.

Danckwerts, in reply.

LORD ESHER, M.R. In my opinion the questions into which the counsel for the defendants have endeavoured to lead us with regard to the law of bankruptcy and the law of guarantees have nothing to do with this case, and I decline to go into them. I do not think this contract is to be looked at as one of a guarantee in the usual sense of the term, but as a contract of insurance. The defendants are incorporated as the Mortgage Insurance Corporation, Limited, for the express purpose of insuring mortgages and other securities, and they issue policies. The contract now in question begins with the words, "This policy of insurance." It seems to me clear that the intention was that this contract should be one of insurance, and that those who entered into it with the plaintiff should be in the position of underwriters. An underwriter is not a surety. He is a person who undertakes to pay money in a certain event. The form of a policy is not that of a guarantee. A policy on a ship, for instance, is not an undertaking to pay the amount insured, if somebody else, e.g., the owner of another ship that has caused the loss, does not, but to pay such amount on the loss of the ship. Here the policy recites that the plaintiff is the holder of a deposit receipt for 1000*l.* of the Commercial Bank of Australia,

(1) Law Rep. 10 Ch. 211. (2) Law Rep. 8 Ex. 136.
(3) [1893] 3 Ch. 540.

and is desirous of being "insured" as thereinafter appearing, and the defendants thereby in effect promise to pay the "assured" the principal sum, if the debtors have made default in so doing. What the defendants have done, as it appears to me, is to insure payment of the deposit receipt according to the contract made between the depositor and the bank, i.e., that the bank will pay the amount at the date fixed by that contract for payment. The policy is not a guarantee that the bank will be able to pay; it is a positive direct contract that, if the bank does not pay a certain amount on a fixed day, the insurance company will pay that amount. By the law of insurance, though the underwriter directly promises to pay on a certain event, the contract is treated as one of indemnity; and it follows that, if the assured, who has been indemnified by the underwriters as on a total loss, saves anything upon the loss, that salvage must go to the underwriter; otherwise the assured would be more than indemnified. That is an incident of every kind of insurance which is held by law to be a contract of indemnity. Therefore, in such a case, if the assured does obtain anything by way of salvage out of the subject-matter insured, he must account for that to the underwriter; and, further than that, if anything is obtainable by way of salvage, he has no right to say to the underwriter that he will not take any step in order to obtain such salvage; he is bound to assist the underwriter in obtaining it. For instance, in the present case, if the bank had not failed, but had remained in perfect credit, and it had on some untenable ground refused to pay the plaintiff at the time when, according to the deposit note, payment was due, the plaintiff would not be bound first to sue the bank; the policy is made for the very purpose among others of preserving her from that necessity: she would be entitled to receive payment from the defendants, the insurers; but then, if, after they had paid her, the bank, discovering their mistake, were to pay her the amount of the deposit, she would be bound to account for it to the defendants; or, on the other hand, if the bank still refused to pay, she would be bound to allow the defendants to sue in her name. All that is well-understood law with regard to insurance. I think that it is only bewildering to look away from the plain terms of this contract and add to it,

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as suggested by the counsel for the defendants, other words qualifying the words actually used by reference to the alleged law of the colony as to schemes of arrangement by companies with their creditors. It is quite immaterial to the plaintiff whether there was any scheme of arrangement or not. Nothing is material, so far as she is concerned, after the fact that, the day of payment according to the contract between her and the bank having arrived, she was not paid. If after that by any law anything can be got from the bank, it is for the insurers to get it, the plaintiff being bound to put no difficulties in their way. It seems to me that this is a simple case of insurance, and that no plausible suggestion of any defence to this action has been made out. If the conclusion to which I have come wanted any confirmation, I think it would be found on reference being made to condition No. 2 indorsed on the policy; but I should come to precisely the same conclusion in the absence of that condition. For these reasons I think that this appeal must be dismissed.

LOPES, L.J., concurred.

KAY, L.J. It does not seem to me material to consider whether the contract sued upon is a contract of suretyship or a contract of insurance, because I think that in either case the default which it contemplated actually occurred, and the right to sue upon it became an absolute right, which has not been defeated by anything that subsequently took place. The facts are these. The plaintiff deposited funds in a bank in Australia on the terms that the amount so deposited should be repayable at a certain date. When that date arrived the bank did not pay the money. Nothing had then occurred which in any way destroyed the debt due from the bank. Notice of default was duly given to the defendants, and after the lapse of three months from such notice the plaintiff sued the defendants upon the policy, the terms of which are as clear as can be to the effect that, if the bank made default, the defendants would pay the money within three months after notice of such default. I can see no possible answer to that action. Assume that this is a mere contract of guarantee or

suretyship. At the moment when the money became due, default was made by the principal debtor, and thereupon the right of the plaintiff as against the so-called guarantor or surety under the contract came into existence. It happened afterwards that an arrangement was entered into for the winding up and what has been called "reconstitution" of the bank with which the money was deposited; and it is stated that by virtue of a Colonial Act such arrangement is binding on all the creditors of the bank, including the plaintiff. Thereupon the ingenious but, as it seems to me, fallacious argument was put forward by the defendants' counsel that the scheme of arrangement amounted to an accord and satisfaction for the original debt, the effect of which was to discharge the defendants' liability. An answer to that contention may be found in the case of *Slater* v. *Jones* (1), the result of which appears to be clearly to shew that a composition resolution by a meeting of creditors under the bankruptcy laws, by which all creditors are bound, would not operate in the manner suggested by the defendants' counsel. But then it was argued that, nevertheless, there was no default by the bank within the meaning of the contract; because the plaintiff who deposited money in the bank must be taken to have known the law of Australia, and therefore to have known that, if the bank got into difficulties, the depositor might be compelled to accept something other than her debt, such as in this case, a deposit receipt and shares in a newly-constituted company; and consequently it must be treated as part of the original contract that the depositor would accept payment in cash or in such other way as a majority of creditors might agree to under the colonial statute. If that were so, it does not follow that there was no default within the meaning of the contract upon which the plaintiff sues. All the proceedings with regard to the scheme of arrangement took place after the default of the bank and due notice of it given to the defendants. It was decided in *Ex parte Jacobs* (2) that a resolution for liquidation or composition, though binding on all the creditors, is a discharge of the debtor by operation of law, and does not discharge the surety. Assuming that this contract was, as contended by the defendants'

(1) Law Rep. 8 Ex. 136. (2) Law Rep. 10 Ch. 211.

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counsel, a mere contract of guarantee or suretyship, it seems to me that default did occur within the meaning of that contract, and that therefore a right of action vested in the plaintiff to which what occurred afterwards affords no kind of defence. For these reasons I think that the appeal fails.

Appeal dismissed.

Solicitors for plaintiff: *Beaumont, Son, & Rigden.*
Solicitors for defendants: *Baker, Blaker, & Hawes.*

E. L.

1893 *Nov.* 10.

STROUD, APPELLANT *v.* WANDSWORTH DISTRICT BOARD OF WORKS, RESPONDENTS.

Metropolis—Management Acts—Repair of Carriage Road—Necessary Works of Repair—Apportionment and Recovery of Expenses—Question as to Necessity of Works — Right of Local Authority to decide—Metropolis Management Amendment Act, 1890 (53 & 54 *Vict. c.* 66), *s.* 3.

Under s. 3 of the Metropolis Management Amendment Act, 1890, which empowers vestries or district boards to execute any necessary works of repair upon carriage roads, and to apportion and recover the expenses, it is for the vestry or district board to decide as to the necessity of the works, and they are not bound to prove such necessity to the satisfaction of the tribunal before which they seek to recover the expenses.

CASE stated by a metropolitan police magistrate.

The respondents were the board of works for the Wandsworth district. The appellant was the owner of a house and land situate in and abutting upon Avenue Road, Wandsworth.

Avenue Road was within the respondents' district, and had at the time of the works hereinafter mentioned been used for more than six months for public traffic, and had not become repairable by them.

On March 23, 1892, a resolution was passed by the respondents to execute certain works of repair upon the road in pursuance of the powers given to them by s. 3 of the Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66) (1), and which were deemed by them to be necessary.

(1) The material provisions of the section are set out in the judgment of Charles, J., post, page 67.

The works were done by the respondents' surveyor, and by an order subsequently made by them the sum of 26*l.* 0*s.* 9*d.* was apportioned upon the appellant in respect of such works.

On behalf of the respondents it was contended that, under s. 3 of the Metropolis Management Amendment Act, 1890, it was for them to decide whether any works of repair were necessary; that they had decided that the works in Avenue Road were necessary; that they had done the works and had duly apportioned the expenses thereof upon the owners of houses and land abutting on the road, and that the appellant was liable to pay the amount apportioned on him.

On behalf of the appellant it was contended that the question whether any works of repair were necessary or not was a question to be decided by the magistrate, and that part of such works, namely, on that portion of the road bounding his premises, and in respect of which the apportionment had been made upon him, was not in fact necessary to be done.

The magistrate was of opinion that it was for the respondents, and not for him, to decide whether the works of repair were necessary or not, and he ordered the appellant to pay the amount claimed.

The question for the opinion of the Court was whether the determination of the magistrate was right in point of law.

Nov. 3. *Stroud*, for the appellant. The magistrate was wrong in holding that the district board had an absolute power to decide as to the necessity of the works. If it had been the intention to confer such a power upon them, it would have been so provided by express enactment. In 53 & 54 Vict. c. 54, s. 1 (passed the same day as the Act now under discussion), the words are "shall deem it necessary or expedient," and similar provisions are contained in the other Acts relating to the Metropolis, and in the Public Health Acts. Such an arbitrary power on the part of a public body is not to be implied. To bring the case within the section the board must shew that the expenses are necessary, and, therefore, before they can recover they must prove the necessity to the satisfaction of the tribunal which has to decide as to the liability. [He referred

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to *Ex parte Whitchurch* (1); *Swanston* v. *Twickenham Local Board* (2); *Vestry of St. Giles, Camberwell* v. *Board of Works for Greenwich District* (3); *Reg.* v. *Marsham.* (4)]

J. C. Earle, for the respondents. The appellant's contention practically makes the Act a nullity, for the district board cannot go before the magistrate to recover the expenses until after the works are executed, and the result would be that in every case they would have to do the works and run the chance of afterwards having the expenses of works, which they bonâ fide believed to be necessary and which probably their surveyor advised were necessary, disallowed. The cases referred to are not in point.

[CHARLES, J. There are obvious inconveniences whichever way the point is decided.]

Stroud, replied.

Cur. adv. vult.

Nov. 10. The following judgments were delivered:—

CHARLES, J. In this case the respondents are the board of works for the Wandsworth District. The appellant is the owner of a house and land within that district abutting on a road called Avenue Road, which at the time of the execution of the works hereinafter mentioned had been used for more than six months for public traffic, and had not become repairable by the respondents. On March 23, 1892, the respondents resolved to execute some repairs on the road under the powers given to them by the Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66), s. 3. The repairs were deemed by them to be necessary. The works were done in pursuance of the resolution, and the expenses were apportioned among the adjoining owners. On the hearing of a summons claiming from the appellant the amount of his share of the apportionment, he proposed to contest the necessity of the repairs; but the magistrate was of opinion that it was not for him to decide whether the repairs were necessary or not, and that he was bound by the decision of the respondents upon the point. He accordingly ordered the appel-

(1) 6 Q. B. D. 545.
(2) 11 Ch. D. 838.
(3) 19 Q. B. D. 502.
(4) [1892] 1 Q. B. 371.

lant to pay the amount. The question we now have to determine is whether his ruling was correct.

The section of the statute is as follows:—

"Any vestry or district board may from time to time execute any necessary works of repair upon any or any part of any carriage-road within their parish or district which shall have been used for not less than six months for public traffic, and which may not at the time of such repair have become repairable by them, and shall not by undertaking such repair prejudice or affect the powers of such vestry or district board to apportion and recover the expenses of paving such road or way if and when the same shall be paved as a new street under the Metropolis Management Acts."

It is then provided that the expenses of "such repair" may in the first instance be paid by the local authority in the same manner as the expenses of repairing other streets repairable by them, and afterwards be apportioned and recovered from the owners of adjoining lands "in the same manner" as if such expenses were expenses of paving such road as a new street under the provisions of the Metropolis Management Acts relative thereto in a court of competent jurisdiction.

Railway companies whose premises do not directly communicate with the road are by a proviso exempt from contribution; but in the event of a direct communication being made by any railway company with the road before the road is taken over by the local authority, a "just share of the said expenses" is to be paid by such company.

It was urged on us by the appellant that the works must appear to be "necessary" to the tribunal before which the question is raised—that is to say, in this case to the magistrate who heard the summons. It is obvious that, if this be the true view, it will render it very difficult, if not impossible, for a local authority to use the powers conferred by the section, for in many cases their decision as to necessity would certainly be challenged by adjoining landowners, and protracted litigation might ensue.

On the other hand, it is hard that a landowner should be bound to pay for repairs done without his consent on his own private land, which he believes to be unnecessary, until the decision

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of a judicial tribunal on the question of necessity has been obtained.

At the same time it must be remembered that the legislature were dealing in this section with a public body charged with the performance of important public duties, and that there is no manifest injustice or absurdity involved in holding that to them is committed an absolute discretion in the matter, provided, of course, that they act bonâ fide, and from no sinister or collateral motive; and after some hesitation and examination of cases in which similar questions have been raised on other Acts of Parliament, I have come to the conclusion that this section does constitute the local authority the sole judge of the necessity of the repairs. It is true that the words differ from those in 18 & 19 Vict. c. 120, s. 105, which authorizes the local authority to do paving works in any case where they may deem it to be necessary or expedient; but I do not think this difference in language sufficient to justify the contention of the appellant.

The principle which governs the construction of such enactments was thus stated by Lord Cranworth in *Stockton and Darlington Railway Company* v. *Brown* (1), where he is dealing with the proper interpretation of Acts of Parliament authorizing railway companies to take land "for the purposes of their undertaking." "I think it clear," he says, "that when the legislature authorizes railway directors to take for the purposes of their undertaking any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands, provided only that they take them bonâ fide . . . . This is the construction to be put on all such legislative powers, whether the language of the Act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or expedient to be taken, or simply that the company may take lands for the purposes of the undertaking." This principle, it is pointed out by Stirling, J., in *Lewis* v. *Weston-super-Mare Local Board* (2), may be the more readily applied "where the powers are vested in a public corporation charged with the performance of important public duties, and acting for the benefit of the whole community." In the last-mentioned

(1) 9 H. L. Cas. 246, at p. 256.

(2) 40 Ch. D. 55.

case the Court had to construe the 16th section of the Public Health Act, 1875, which empowers a local authority to carry a sewer through private lands "if, on the report of the surveyor, it appears necessary." The learned judge considered on these words that the person to judge of the necessity was the surveyor; but he adds, "Even if the words were simply 'if it appears necessary,' I should be of opinion that the persons to judge of the necessity were the local authority, or competent persons employed to advise them on the question." (1) In the section under discussion the words are "necessary works"; but I cannot see any substantial difference between those words and works which "appear necessary," and the observation of the learned judge therefore seems to me to be applicable to the present case, and to support the conclusion at which I have arrived. The appeal must be dismissed with costs.

WRIGHT, J. I am of the same opinion, but I entertain great doubt, for it is not easy to distinguish the present case from the case cited by Mr. Stroud, *Reg.* v. *Marsham* (2), where it was held by the Court of Appeal that the apportionment by a district board of works of expenses incurred in paving a new street was not binding and conclusive for all purposes, and that upon the hearing of a summons to enforce payment of an apportioned share of the expenses evidence might be given to shew that the amount alleged to have been expended had not been actually expended, or included expenses other than paving expenses.

It is no doubt as a question of construction difficult to see why the magistrate should not be bound to inquire into the question whether the works were necessary before making an order for payment of the apportioned expenses. The point is not raised as to whether he ought to have inquired whether the works were works of repair. If it had been, possibly something more might have been made of it than can be made of the point which has been raised. The question for our determination is whether, assuming the works to be works of repair, the necessity of them is for the local authority or the magistrate to determine. In considering this question we do not get much assistance from

(1) 40 Ch. D. at p. 62. (2) [1892] 1 Q. B. 371.

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the railway cases or from the cases decided under s. 16 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), because in those Acts there are provisions for making compensation, which is not the case here. We should rather look at the cases under s. 150 of the Public Health Act, 1875, and under the Metropolis Management Acts. Mr. Stroud's argument is that in all those cases the local authority is expressly given a discretion to determine as to the necessity of the works. Still I think we cannot infer, in the present case, from the use of the word "necessary" alone, without any express words giving discretion to the local authority to determine what is necessary, that they possess no such discretion. From the nature of the case it is apparent that the question as to the necessity of the works must be a matter of opinion, and can hardly be satisfactorily determined except by the local authority with reference to their general standard of repairs and their view of the requirements of the locality. There would be considerable inconvenience and difficulty in trying the question of the necessity judicially. Surveyors of more or less eminence would no doubt be called on both sides, and would very probably differ in opinion, and it would be difficult to decide on the conflicting testimony. The most sensible view of the question is that a discretion is given to the local authority to determine as to the necessity of the works. I agree, therefore, that our judgment ought to be for the respondents, with costs.

Judgment for the respondents.
Leave to appeal given.

Solicitors for appellant: *Rexworthy & Stroud.*
Solicitors for respondents: *W. W. Young & Son.*

P. B. H.

PHARMACEUTICAL SOCIETY *v.* DELVE.

1893
Oct. 31.

*Pharmacy Acts—Sale of Poison—Medicine containing Poison—Infinitesimally small Quantity—*31 *&* 32 *Vict. c.* 121, *s.* 15.

In order to render a person liable, under the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15, for selling poison without being a chemist within the meaning of the Act, it is not sufficient to prove the sale of a compound containing an infinitesimally small quantity of a poison as defined by the Act.

APPEAL by the plaintiffs from the decision of the judge of the county court at Manchester.

The plaintiffs' claim was "for amount of penalty incurred by the defendant on November 19, 1892 in keeping open shop for the retailing dispensing or compounding of poison to wit a 'preparation of morphine' called 'Licoricine' contrary to the provisions of the Pharmacy Act 1868 (31 & 32 Vict. c. 121) (1); 5*l*."

At the trial the defendant's counsel admitted that preparation of morphine was poison within the Act, and that if the defendant was shewn to have sold a preparation of morphine he had committed an offence within the Act.

A witness called for the plaintiffs proved the purchase at the defendant's store on the day in question of a bottle of "Licoricine," which he produced. An analyst was called, who stated that he received the bottle, and analysed the contents. He found morphine, but did not estimate the actual quantity. He further said: "It was not a trace; it was more; I was not

(1) By s. 1 of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), it is made unlawful for any person to sell, or keep open shop for retailing, dispensing, or compounding poisons, unless he is a pharmaceutical chemist, or a chemist and druggist within the meaning of the Act, and is registered under the Act.

By s. 2 poisons are defined as the several articles named in Schedule A, part 2 of which includes opium and all preparations of opium.

By s. 15 a penalty of 5*l*. is imposed for every offence, recoverable in the manner provided by the Pharmacy Act, 1852 (15 & 16 Vict. c. 56), that is (by s. 12), "by plaint under the provisions of any Act in force for the more easy recovery of small debts and demands."

By an Order of the Privy Council under s. 2 of the Pharmacy Act, 1868, confirming a resolution of the Pharmaceutical Society, and published in the London Gazette of December 21, 1869, it is declared that preparations of morphine ought to be deemed a poison within the meaning of the Act.

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instructed to take quantity; it might be that the quantity is one-fiftieth of grain per ounce, three-fiftieths of grain in bottle. I am not prepared to say whether the taking of the whole of the contents of the bottle would do an adult any harm."

The plaintiffs contended that the presence of any morphine whatever in the mixture rendered the defendant liable; but the judge did not consider that the evidence as to quantity was sufficient to justify judgment for the plaintiffs, and gave judgment for the defendant with leave to appeal.

Finlay, Q.C. (*T. R. Grey*, with him), for the plaintiffs, in support of the appeal. It having been proved at the hearing before the county court judge that some morphine was contained in the medicine sold by the defendant, he ought to have been held liable to the penalty irrespective of any question as to the quantity so contained. The object of the Pharmacy Act is to protect the public from the danger which may arise from the sale of poisons by unqualified and ignorant persons, and this object would be best carried out by holding the prohibition to apply to all sales. The present point was mentioned, but not decided, in *Pharmaceutical Society* v. *Piper & Co.* (1) In giving judgment in that case Lawrance, J., said: "After giving the best consideration I can to the question whether a person who is not a chemist can sell a proprietary medicine containing poison, I have come, not altogether willingly, to the conclusion that he cannot." (2) And in the same judgment he said: "Of course, every case can be so put as to appear ridiculous, and the case has been put to us of a medicine containing an infinitesimal quantity of poison; but it is obvious that, at any rate, no harm would be done by labelling such a medicine 'poison.' There is a point at which any medicine containing poison may become dangerous, and we ought not to fritter away the provisions of an Act of Parliament, the object of which is to protect the public, and to prevent unqualified persons, who may have no scientific or chemical knowledge whatever, from retailing, dispensing, or compounding poisons." (3) These observations are favourable

(1) [1893] 1 Q. B. 686. (2) [1893] 1 Q. B. at p. 690.
(3) [1893] 1 Q. B. at pp. 692, 693.

to the present appellants' contention. It is true that in the same case Collins, J., left the point open, for he said: "I do not think it necessary to lay down a rule which would cover every case where a compound contains an infinitesimally small quantity of poison; that question can be dealt with when it arises." (1) It was unnecessary there to decide that point, but the terms of the Act are wide enough to cover the present case.

Bonsey, for the defendant, was not called on.

CHARLES, J. I cannot differ from the conclusion at which the county court judge has arrived in this case. The action is brought to recover a penalty under s. 15 of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), for selling poison without being duly registered as required by the Act. It was proved that the medicine sold by the defendant contained a small quantity of morphine; but the analyst to whom the medicine was submitted for examination was not instructed to ascertain the quantity of morphine so contained. He did mention a very small quantity which he said there might be in the medicine; but the county court judge was not satisfied that the evidence as to the quantity was sufficient to justify him in giving judgment for the plaintiffs, and he accordingly decided that the defendant was not liable to the penalty. I am of opinion that he was right in so deciding.

WRIGHT, J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Flux, Son, & Co.*

Solicitors for defendant: *Neve & Beck.*

(1) [1893] 1 Q. B. at p. 694.

P. B. H.

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Oct. 27.

LAIDLAW *v.* WILSON.

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 25—*Contract to Supply Goods in Instalments—Written Warranty in Contract—Whether a Warranty within the Act.*

A firm of lard manufacturers on December 17, 1892, entered into a written contract for the sale of lard to the respondent in the following terms: "We have this day sold to you three tons Kilvert's Pure Lard for delivery to end of January, 1893." On December 23 a parcel of lard was consigned to the respondent by the said manufacturers and delivered to him under the said contract. The respondent subsequently sold a portion of such parcel to the appellant as and for lard. Upon analysis it turned out to be adulterated. The respondent had sold it bonâ fide and in the same state as it was in when he bought it. On an information against the respondent for having, contrary to the provisions of the Sale of Food and Drugs Act, 1875, sold the lard not being of the nature, substance and quality demanded by the appellant:—

Held, that the contract of December 17 contained a sufficient written warranty of purity in respect of the specific parcel consigned on December 23 to satisfy s. 25 of the Act, and that the respondent was entitled to be discharged from the prosecution.

Harris v. *May* (12 Q. B. D. 97) distinguished.

Case stated by justices.

On March 2, 1893, the appellant purchased in the respondent's shop half a pound of lard, which on analysis was found to contain 7 per cent. of beef fat. The respondent being summoned for having sold to the prejudice of the appellant an article of food not being of the nature, substance and quality demanded by the purchaser, contrary to the provisions of s. 6 of the Sale of Food and Drugs Act, 1875, proved that he had purchased the lard of Messrs. Kilvert & Sons, Limited, manufacturers in Manchester, under a written contract in the following form:—

"*Contract.*

"Mark Lane, Withy Grove,
"Manchester.
"December 17, 1892.

"To Mr. Walter Wilson, Newcastle-on-Tyne.

"We have this day sold to you three tons Kilvert's Pure Lard on the basis of 56/3 per cwt. for Kiel's delivery to end of January, 1893.

"p. pro Kilvert & Sons, Limited.
"M. A. Holgate."

The particular half-pound of lard sold to the appellant formed part of two barrels delivered by Messrs. Kilvert under the above contract, the delivery of which two barrels was accompanied by the following invoice:—

"Mark Lane, Withy Grove,
"Manchester.
"December 23, 1892.
"Mr. W. Wilson, Newcastle, to Kilvert & Sons, Limited,
"Lard Refiners.
"2 barrels Kilvert's Pure Bladdered Lard,
"2 cwt. 2 qrs. @ 56/3 7*l.* 0*s.* 8*d.*"

The respondent, who had sold the lard in the same state as that in which he purchased it, and without reason to believe that it was otherwise than pure, relied upon the contract and invoice as together constituting a "written warranty" of the purity of the lard within the meaning of s. 25 of the Act. (1) The justices held the respondent's contention to be correct, and dismissed the summons, subject to a case for the opinion of the Court.

Robson, Q.C. (*Simey*, with him), for the appellant. The documents relied upon by the respondent do not contain a warranty within the meaning of the section. An implied warranty is not enough. The word "warranted," or some word equivalent to it, must be actually used. In *Rook* v. *Hopley* (2), where a person who was charged with selling adulterated lard, proved that he sold it in the same condition as it was in when he bought it, and that when he bought it he received an invoice in which it was described as "lard," it was held that the invoice was not a warranty of the purity of the lard; Pollock, B., observing that in his opinion "what is required by the statute is a writing

(1) By s. 25 of the Sale of Food and Drugs Act, 1875: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution."

(2) 3 Ex. D. 209.

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expressing on the face of it that it is a warranty." In *Harris* v. *May* (1), upon an information for selling adulterated milk, the defendant proved that he had bought it under a written contract, whereby his vendor agreed to deliver so many gallons of pure milk every day for a certain period, but it was held that such contract did not constitute a written warranty of the purity of the specific milk sold by the defendant to the complainant. If then the contract under which Messrs. Kilvert sold the lard on December 17 did not constitute a warranty, the invoice of December 23 will not assist the respondent, for a warranty must be part of the contract; and an invoice is no part of the contract, but a mere circumstance incident to the delivery. The contract was complete on December 17. Secondly, the warranty, if the documents are to be treated as containing one, is not a warranty that the lard is "pure lard," but merely that it is "Kilvert's Pure Lard," and that warranty would be satisfied by the delivery of impure lard, provided it was of the quality known as Kilvert's Pure Lard.

Lawson Walton, Q.C., for the respondent. The contract and the invoice taken together amount to a sufficient written warranty to satisfy the statute. The question is concluded by the case of *Farmers' Company* v. *Stevenson*. (2) There the defendants, retail milk dealers, purchased milk under a written contract, whereby the vendors agreed to supply a certain quantity of milk daily. The contract contained a clause to the effect that the vendors "warrant each and every supply of milk to be delivered under this contract to be pure." Each churn of milk when delivered had attached to it a label stating that it was "warranted genuine new milk with all its cream on." It was held that the contract and label together constituted a written warranty. The addition of the label there distinguished that case from *Harris* v. *May*. (1)

In *Rook* v. *Hopley* (3) there was clearly no warranty of purity, the only statement being that the thing sold was lard, not that it was pure lard.

Robson, Q.C., in reply. Even if the case of *Farmers' Company*

(1) 12 Q. B. D. 97. (2) 55 J. P. 407; 60 L. J. (M.C.) 70.
(3) 3 Ex. D. 209.

v. *Stevenson* (1) was rightly decided, it is distinguishable from the present, for there the word "warranted" was expressly used both in the contract and the label.

CHARLES, J. I am of opinion that this appeal must be dismissed. The respondent was summoned for having in breach of s. 6 of the Sale of Food and Drugs Act, 1875, sold half-a-pound of lard not being of the nature, substance and quality demanded by the purchaser. It was not disputed that the lard in question was adulterated with foreign matter, but the respondent relied upon the defence afforded by s. 25, which provides that, "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in substance, nature and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution." The lard was purchased under a written contract which stated that "we have this day sold you three tons of Kilvert's Pure Lard." And the particular consignment under that contract of which the half-pound sold to the appellant formed parcel was accompanied by an invoice which described the goods consigned as "Kilvert's Pure Bladdered Lard." The respondent contends that the contract contained a written warranty that the lard should be pure. It is true that the contract does not in terms say that the purity of the lard is warranted, but in my judgment it is not necessary that the word "warranted" should be actually used. To my mind it is enough if the language of the document imports a warranty, and shews an intention on the part of the vendor to warrant. It was, however, said on the part of the appellant that there were two cases which were opposed to that view. The first was *Rook* v. *Hopley*. (2) But that case is distinguishable on two grounds. In the first place the statement there was that the thing sold was lard simply: there was no statement of its purity. And, secondly, the statement there, such as it was, was to be found in an invoice

(1) 55 J. P. 407; 60 L. J. (M.C.) 70. (2) 3 Ex. D. 209.

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only. But the invoice was no part of the contract, and it is in the contract, and in the contract alone, that the warranty which the statute requires must be sought. I decide the present case upon the construction which is to be put, not upon the invoice of December 23, but on the contract of December 17. The other case relied on by the appellant was *Harris* v. *May* (1) where it was held that a written contract made on March 24, whereby one F. agreed to deliver to the defendant eighty-six gallons of pure milk every day for six months, did not constitute a written warranty in respect of a specific can of milk delivered by F. on April 12. There, no doubt, Lord Coleridge, at the commencement of his judgment, said that, in his opinion, the contract relied on by the defendant was not a written warranty within the meaning of the Act. But, on looking at his judgment as a whole, I think that what he really meant was that it was not such a warranty as would cover the specific delivery of milk on April 12, in the absence of some written evidence that that specific delivery was made under the contract. In the present case there is evidence that the particular parcel of lard was delivered under the contract, the delivery having been accompanied by an invoice which describes the lard in the same terms as those contained in the contract. The invoice, however, is material, not as itself containing a warranty of purity, but as earmarking the particular parcel as having been delivered under a contract in which a written warranty of purity was contained.

WRIGHT, J. I am of the same opinion. The word "pure" in the contract of December 17, amounts to an agreement as an essential part of the contract that the lard supplied should be pure, and that is, in my opinion, a sufficient warranty of its purity within the meaning of the section. Apart from the use of that word pure, the contract would have been satisfied by the delivery of lard which was merely merchantable. As to the appellant's contention that the warranty was, not that the lard should be pure, but that it should be merely Kilvert's Pure Lard, it is enough to observe that the lard was obtained directly from

(1) 12 Q. B. D. 97.

Kilvert, and there was no evidence that the expression Kilvert's Pure Lard had come to be used in the trade as denoting any particular quality of lard.

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Appeal dismissed.

Solicitors for appellant: *Simey, Son, & Stiff, Sunderland.*
Solicitors for respondent: *Dix & Warlow, Newcastle-on-Tyne.*

J. F. C.

CRAWSHAW *v.* HARRISON. FRASER, CLAIMANT.

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Oct. 27; *Nov.* 1.

Sheriff—Execution for more than 20*l.—Sale by Sheriff by Private Contract—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 145, *Effect of.*

Where a sheriff under an execution for a sum exceeding 20*l.* sells the goods of a debtor by private contract with the consent of the debtor but without the leave of the Court, such sale, although in breach of the provisions of s. 145 of the Bankruptcy Act, 1883, is, until set aside by the Court, valid as against a subsequent execution creditor.

APPEAL from the county court of Yorkshire.

In March, 1892, judgment was recovered for a sum of more than 20*l.* by one Wilkes against Eleanor Harrison, the debtor, and the sheriff seized the defendant's goods in execution. On March 14, the sheriff, having duly advertised the sale, proceeded to sell the goods by public auction. He succeeded in selling some of the goods; but at the end of the day's sale he found that he had only realized a sum less by 9*l.* than what was required to satisfy the judgment. At that time the debtor was indebted to the claimant to the amount of 26*l.* for money lent. And accordingly, on the following day, there being 25*l.* worth of goods of the debtor still unsold, the sheriff proposed to the claimant that he should sell him the residue of the goods for 25*l.*, and that the claimant in payment thereof should give to the sheriff 9*l.*, being the sum required for the execution, and as to the remaining 16*l.* should write off that amount from the debtor's indebtedness to him. This proposal was accepted and the arrangement was carried out. Subsequently, on June 30, 1892, judgment was recovered in the High Court by the present execution creditor against the debtor for a sum of 32*l.* 2*s.*, and in

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execution of that judgment, on September 29, 1892, the sheriff seized the goods, which had been the subject of the above-mentioned private sale to the claimant, as being the goods of the debtor. The claimant claimed the goods, and the sheriff interpleaded. The interpleader issue was remitted to the county court of Yorkshire holden at Scarborough, and upon the trial of the issue on June 6, 1893, the judge gave judgment for the claimant.

The execution creditor appealed.

Macmorran, for the execution creditor. The goods were still the goods of the debtor, notwithstanding the private sale to the claimant. No property passed to the claimant by such sale, for it was rendered void by the provisions of s. 145 of the Bankruptcy Act, 1883. (1) The language of that section is absolutely prohibitory.

Scott Fox, for the claimant. Although the leave of the Court was not obtained, the sale was good. The only effect of the disregard of the section was to render the sheriff liable to an action at the suit of any one who was prejudiced by his act. The leave of the Court is only necessary to protect the sheriff from such an action; its absence does not avoid the sale.

Macmorran, in reply.

Cur. adv. vult.

CHARLES, J. The question which we have to consider is as to the proper construction to be put upon s. 145 of the Bankruptcy Act, 1883. The facts of the case are these: The sheriff being about to sell the goods of a debtor under an execution for a sum exceeding 20*l.*, duly advertised that such goods would be sold, and in due course proceeded to sell them by public auction. At the auction he did not succeed in selling a sufficient quantity of the goods to satisfy the judgment, and accordingly, on the fol-

(1) By s. 145 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), "Where the sheriff sells the goods of a debtor under an execution for a sum exceeding twenty pounds (including legal incidental expenses), the sale shall, unless the Court from which the process issued otherwise orders, be made by public auction, and not by bill of sale or private contract, and shall be publicly advertised by the sheriff on and during three days next preceding the day of sale."

lowing day, with the consent, and probably at the request, of the debtor, he sold the remainder of the debtor's goods by private contract to the claimant, and out of the proceeds satisfied the balance of the judgment. Subsequently, another judgment creditor of the same debtor sought to levy execution upon the goods so purchased by the claimant, contending that, inasmuch as they had been purchased by private contract and not at a public auction, the purchase was rendered altogether void by the provisions of s. 145 of the Bankruptcy Act, and consequently the goods remained the goods of the debtor. Now, the words of the section are these: "Where the sheriff sells the goods of a debtor under an execution for a sum exceeding 20*l*. . . . the sale shall, unless the Court from which the process issues otherwise orders, be made by public auction, and not by bill of sale or private contract, and shall be publicly advertised by the sheriff on and during three days next preceding the sale." One object of that section is clearly to protect the debtor. But here, the sale was at the request, or, at all events, with the concurrence, of the debtor; therefore, it is obvious that she cannot be heard to say that it was void. In *Gowan* v. *Wright* (1), a case decided under s. 27 of the Debtors Act, 1869, which provides that a judge's order for judgment made by consent of the defendant should, unless filed in a certain manner and time, be void, it was held that, although non-compliance with the requirements of the section avoided the order as against the creditors of the defendant, the consenting defendant himself could not take advantage of such non-compliance. A fortiori, then, the debtor here could not have taken advantage of the sheriff's non-compliance with s. 145. Nor could Wilkes the execution creditor have raised any objection, for the proceeds of the sale were used for the purposes of the execution.

A case of *Pritchard* v. *Humphreys* (2) was decided by Wright, J., under s. 145 of the Bankruptcy Act, upon the same principles as those which governed *Gowan* v. *Wright* (1), and his decision was affirmed by the Court of Appeal, the Master of the Rolls saying that he would assume that the sale was irregular. It is clear, therefore, that the section does not make a sale by private

(1) 18 Q. B. D. 201. (2) Not reported.

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contract void. No doubt such a sale is irregular, and, in the event of the debtor becoming bankrupt, a creditor might apply to the Court to have the sale set aside, and it may be that a creditor might be entitled to make such an application even though no bankruptcy supervened. But no such application has been made here; and in the absence of such an application the sale must be held to be good, and the property in the goods to be in the claimant. The appeal must be dismissed.

WRIGHT, J. I am of the same opinion. We are asked to decide whether, where a sheriff sells goods under an execution for a sum exceeding 20*l.*, the purchaser can acquire a good title if the requirements of s. 145 of the Bankruptcy Act have not been complied with. I think he can. The section does not say that in such event the sale shall be ipso facto void. The sale, it is true, is irregular, and might upon a proper application by any person who is injured by the irregularity be set aside, while it may be that such person would also have an action against the sheriff for his breach of duty. But no steps have been taken in the present case to set the sale aside. The goods, therefore, are not the goods of the debtor, and the plaintiff is not entitled to succeed. Further, I entertain some doubt whether the sale to the claimant was a sale by the sheriff and so came within the section at all. It seems to have been rather a sale by the debtor herself than a sale by the sheriff as such.

Appeal dismissed.

Solicitors for the execution creditor: *Hamlin, Grammer, & Hamlin, for Milling & Compston, Leeds.*

Solicitors for the claimant: *Iliffe, Henley, & Sweet, for Watts, Kitching, & Donner, Scarborough.*

J. F. C.

TRAYNOR *v.* JONES AND OTHERS. 1893 *Nov.* 6.

Licensing Acts—Beerhouse Licensed before May, 1869—*House Pulled Down for Public Purpose—Transfer of Licence to New House—Discretion of Justices—Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 *& 33 Vict. c.* 27), *ss.* 8, 19.

A house, in respect of which a licence to sell beer to be consumed on the premises was in force on May 1, 1869, and was thenceforward renewed from time to time, was about to be pulled down for a public purpose. The holder of the licence applied to the justices in special sessions, under s. 14 of the Licensing Act, 1828, for a grant of a corresponding licence to sell beer to be consumed on the premises at another house to which it was proposed to remove:—

Held, that the justices had a general discretion to refuse the application, and were not confined to the four grounds of refusal mentioned in s. 8 of the Wine and Beerhouse Act, 1869.

CASE stated by justices.

The appellant was the holder of a licence to sell beer, to be consumed on and off the premises, at a house called the Harp and Shamrock, situate in Mill Parade in the borough of Newport, which premises had been continuously licensed as a beerhouse from a date prior to May 1, 1869. In July, 1893, the said beerhouse was about to be pulled down for a public purpose, that of widening and improving the roadway leading to the Newport Docks. The appellant in consequence applied to the justices at a special sessions under s. 14 of 9 Geo. 4, c. 61 (1), for a grant to her of a similar licence to sell beer to be consumed on and off the premises at a house to which she proposed to remove, situate in Pottery Terrace in the said borough. The premises in Pottery Terrace were distant about 300 yards from the Harp and Shamrock. None of the four grounds for the refusal of a licence

(1) By s. 14 of the Licensing Act, 1828, "If any house, being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways or for any other public purpose . . . it shall be lawful for the justices . . . to grant to the person, whose house shall as aforesaid have been or shall be about to be pulled down, &c. . . . and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail to be drunk or consumed therein."

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specified in s. 8 of the Wine and Beerhouse Act, 1869, existed. (1) The justices in the exercise of a general discretion refused the licence, subject to a case for the opinion of the Court as to whether they had such a discretion.

J. Paterson, for the appellant. The house about to be pulled down, having been licensed as a beerhouse from before May 1, 1869, was a privileged house, and a renewal of the licence to that house, in the absence of any of the four grounds mentioned in s. 8 of the Act of 1869, could not, by reason of the provisions of s. 19, have been lawfully refused. (2) And a grant of a licence under s. 14 of the Act of Geo. 4 to a person whose house shall be about to be pulled down for the improvement of the highways must stand upon the same footing as a renewal. It cannot be that the appellant, who would have an absolute right to the renewal of her licence if her house was left standing, is to be in a worse position because her house is compulsorily pulled down for a public purpose. The case is covered by *Simonds* v. *Justices of Blackheath* (3), where it was held that an application to justices for the transfer of the licence of a privileged beerhouse could only be refused on one of the four grounds. There the licence was sought to be transferred from one person to another; here it is sought to be transferred from one house to another; but that makes no difference in principle.

Macmorran, for the justices. The privilege which s. 19 of the

(1) By s. 8 of the Wine and Beerhouse Act, 1869, all the provisions of the Licensing Act, 1828, as to the terms upon which and the manner in which grants of licences are to be made, are to have effect with regard to the grant of beerhouse certificates, subject to the qualification that no application for a certificate in respect of a licence for the sale of beer not to be consumed on the premises is to be refused except upon one of the four grounds therein specified.

(2) By s. 19: "Where on May 1, 1869, a licence under any of the said recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine, not to be consumed on the premises, may be refused in accordance with this Act."

(3) 17 Q. B. D. 765.

Wine and Beerhouse Act, 1869, confers in respect of beerhouses licensed before May 1, 1869, is not a personal privilege; it was intended to protect the house itself, and not the person occupying it. That section says that it shall not be lawful for the justices to refuse an application for a certificate "in respect of such house or shop," except upon one of the four grounds; the prohibition is confined to an application in respect of the particular house or shop. And that the privilege was not intended to be personal is made still more clear by s. 7 of the Amending Act of 33 & 34 Vict. c. 29, which enacts that s. 19 of the principal Act shall extend to licences renewed from time to time since May 1, 1869, "whether such licences continue to be held by the same person, or have been or may be transferred to any other person." (1) If this were not so, the licensed occupier of a protected house which was being pulled down might choose his own site for the substituted house, and so transfer his licence into a neighbourhood in which, for a variety of reasons, it might be very undesirable to increase the number of existing beerhouses. For this reason there is the very broadest distinction between transferring a licence from one house to another under s. 14, and transferring a licence from one person to another under s. 4. It was under the latter section that *Simonds* v. *Justices of Blackheath* (2) was decided, and that case is consequently not in point.

Paterson, in reply. *Thornton* v. *Clegg* (3) decides that the discretion of justices, whether acting under s. 4 or s. 14 of the Licensing Act, 1828, is to be exercised in precisely the same way.

CHARLES, J. I am of opinion that this appeal must be dismissed. The application was made under s. 14 of the Licensing Act, 1828, which provides that, "If any house, being kept as an inn by any person duly licenced as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any

(1) By s. 7 of the Wine and Beerhouse Act Amendment Act, 1870: "The nineteenth section of the principal Act shall extend to licences granted by way of renewal from time to time of licences in force on May 1, 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person or persons."

(2) 17 Q. B. D. 765.

(3) 24 Q. B. D. 132.

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Act for the improvement of the highways or for any other public purpose, . . . it shall be lawful for the justices to grant to the person, whose house shall as aforesaid have been or shall be about to be pulled down . . . . and who shall open and keep as an inn some other fit and convenient house, a licence." If we look at that section by itself, it seems clearly a matter within the justices' discretion whether they will grant the licence or not. In one case, *Reg.* v. *Rowell* (1), Blackburn, J., referring to s. 14, said: "There is nothing whatever in the Act to make it obligatory on the justices at special sessions to grant a licence." Here, however, there was this additional fact, that the applicant was the holder of a licence in respect of a privileged house, and it was said that by virtue of s. 19 of the Wine and Beerhouse Act, 1869, the justices could only refuse the application upon one or more of the four grounds mentioned in s. 8 of that Act, and the case of *Simonds* v. *Justices of Blackheath* (2) was relied on in support of that contention. That was in my judgment, however, a very different case, the application having been for a transfer, not from one house to another, but from one person to another in respect of the same house. All that the Court there decided was that the same considerations were applicable to a transfer from one person to another as were applicable to a renewal. In the case of an application for a transfer of the licence from one house to another, I am of opinion that the justices have a general discretion, even though the house from which the licence is sought to be transferred is a privileged house. In my opinion, s. 19 only applies where the licence is asked for "in respect of such house or shop," that is, in respect of the privileged house itself. And s. 7 of the Wine and Beerhouse Act Amendment Act, 1870, points in the same direction. Those two sections shew that the privilege conferred in cases in which a beerhouse licence has been enjoyed continuously from May 1, 1869, is a privilege attaching to the premises themselves, and not to the person occupying them; and the holder of the licence is not entitled to go to special sessions and insist that he has a right to a grant of a licence by way of removal under s. 14 of the Act of 1828, except where deprived of that right by

(1) Law Rep. 7 Q. B. 490, at p. 492. (2) 17 Q. B. D. 765.

any of the four matters specified in s. 8 of the Act of 1869. We must assume that in the present case the justices had good reasons for refusing the licence. Their reason probably was that, having regard to the locality, they did not think it desirable to transfer the licence to the premises to which it was sought to transfer it.

WRIGHT, J. I am of the same opinion. Before 1869 a justices' certificate for a licence to sell beer was not necessary. By the Act of that year it was rendered so. Where the application was for a certificate to sell beer to be consumed on the premises, the Act gave a general discretion to the justices as to whether they would grant the certificate or not. But upon this general rule a special exception was engrafted by s. 19 in favour of a certain privileged class of houses. The applicant in the case before us has to bring herself within that exception. That she cannot do, for s. 19 is confined to applications for certificates "in respect of such house or shop," which hers is not. In the case of *Simonds* v. *Justices of Blackheath* (1), it was held that, the house being the same, s. 19 applied although the persons were different. We are now asked to say that the section equally applies where, the person being the same, the houses are different. But to do so would be to disregard the express language of the section. The appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Ince, Colt, & Ince, for Oliver, Newport.*

Solicitors for respondents: *Cole & Jackson, for Newman, Newport.*

(1) 17 Q. B. D. 765.

J. F. C.

1893
Nov. 7, 13.

BIGGS *v.* EVANS.

Estoppel—Conduct—Sale by Agent—Condition against selling without further Authority—Title of Purchaser from Agent—Goods entrusted for Sale—Sale in ordinary course of Business—Factors Acts (6 *Geo.* 4, *c.* 94, *s.* 4; 52 *&* 53 *Vict. c.* 45, *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1.)

Plaintiff was the owner of an opal matrix tabletop, which he entrusted to an agent, who was a dealer in jewels and gems, and, as a known part of his business, sold jewels and gems for other people, in his own name, and having them in his own possession. The tabletop was entrusted on the terms that it should not be sold to any person nor at any price without plaintiff's authority, and that the cheque received in payment should be handed to plaintiff intact, plaintiff agreeing to pay certain commission. The agent sold the tabletop to defendant for 200*l.*, which was satisfied by defendant giving to a judgment creditor of the agent a diamond worth 120*l.*, and paying him 50*l.*, in satisfaction of a judgment for 170*l.*, and paying 30*l.* to the agent.

In an action to recover possession of the tabletop:—

Held, that, as by the conditions on which the tabletop was entrusted to the agent he could not sell it without obtaining further authority, he was acting outside his authority in selling at all, and therefore defendant acquired no title by the sale, and plaintiff was not estopped from disputing his title, but was entitled to recover in spite of the sale:

Held also that, as the tabletop never was entrusted for sale, and as, having regard to the manner in which payment was made, the sale was not in the ordinary course of business, defendant was not protected by the Factors Act which was in force at the date of the transaction (6 Geo. 4, c. 94, s. 4).

Action tried by Wills, J., without a jury.

The plaintiff sued to recover possession of a tabletop belonging to the plaintiff, and which had been entrusted by him to a person named Geddes, and sold by Geddes to the defendant, under circumstances which are fully stated in the judgment.

Nov. 7. *Arthur Powell*, for the plaintiff.
Hammond Chambers, for the defendant.

Cur. adv. vult.

Nov. 13. Wills, J., delivered judgment as follows:—

The plaintiff was the owner of a valuable tabletop made of what is called opal matrix, an exceptional article, but of a class in which jewellers and dealers in gems might be expected to deal.

In the year 1886 he sent it to the business premises of a person named Geddes who was a dealer in jewels and gems; and

who also, as a part of his business, and as a known part of his business, sold such things for other people in his own name, and having them in his possession. The following letter gives the terms of the deposit: "April 30, 1886. I will entrust you with the sale of my opal table upon the following conditions. That the table shall not be sold to any person nor at any price without my authorization is first obtained that such sale shall be effected. That the cheque handed to you in payment for the table shall be paid over to me intact for me to pay into my bankers, and that I shall pay for commission on the sale of the table one-third of the balance which remains after deducting cost of stone mounting and all expenses incurred by me in connection with the same."

Geddes in the year 1888 sold the table out and out to the defendant for 200*l.*, which was satisfied as follows: Geddes asked the defendant to pay 170*l.* for him to Streeter, a West End jeweller, in satisfaction of a judgment which Streeter had obtained against him, and to pay him (Geddes) 30*l.* in cash. The defendant did not pay Streeter 170*l.*, but gave him a diamond valued between him and Streeter at 120*l.*, and paid him 50*l.* in cash.

Geddes shortly afterwards became bankrupt and disappeared. The tabletop at the time of action brought was in the possession of Streeter, who was holding it for the defendant. The plaintiff claims to recover the tabletop from the defendant. The defendant resists the claim on two grounds. First he says that at common law the plaintiff is estopped from denying his title. Secondly, that he is protected by the Factors Acts, from which of course the Act of 1889 must be excluded, as the transaction took place before it was passed. (1) The claim of the defendant at common law is put thus. It is said that the plaintiff enabled Geddes to sell the tabletop as his own, and that his doing so was within the scope of his authority as it would be understood by

(1) 52 & 53 Vict. c. 45, which by s. 14 and the schedule repeals the earlier Factors Acts, preserving any right acquired or liability incurred before the commencement of the Act. The provisions corresponding to 6 Geo. 4, c. 94, s. 4, are contained in s. 1, sub-s. 1, and s. 2, sub-s. 1, of the Act now in force.

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persons who dealt with him, and that, as he had put it in the power of Geddes to commit the fraud, his must be the loss.

I think, however, that a fallacy underlies the expression that he enabled Geddes to commit the fraud. In one sense, and one only, did he do so. He gave him the corporal possession of the tabletop, and it was that possession which enabled Geddes to sell it as his own, or by way of a transaction within the scope of his apparent authority, as a person carrying on a business in which such sales are habitually effected. But it is quite clear that it requires more to found the argument in question. In one sense every person who entrusts an article to any person who deals in second-hand articles of that description enables him, if so disposed, to commit a fraud by selling it as his own. A man who lends a book to a second-hand bookseller puts it into his power, in the same sense, to sell it as his own. A man who entrusts goods for safe custody to a wharfinger, who also deals in his own goods, or in other people's goods entrusted to him for sale, in such a sense enables him to commit a fraud by selling them to a customer. But such a transaction clearly could not give a title to a purchaser as against the owner. The true test is, I take it, whether the authority given in fact is of such a nature as to cover a right to deal with the article at all. If it does, and the dealing effected is of the same nature as the dealing contemplated by the authority, and the agent carries on a business in which he ordinarily effects for other people such dispositions as he does effect, what he has done is within the general authority conferred, and any limitations imposed as to the terms on which, or manner in which, he is to sell are matters which may give a right of action by the principal, but cannot affect the person who contracts with the agent. It is within the scope of the authority that the agent should sell the goods on some terms, and it is not usual in the trade to inquire into the limits or conditions of an authority of that kind; and therefore the principal is supposed, as respects other people, to have clothed the agent with the usual authority. The foundation, however, of the whole thing is that the agent should be authorized to enter into some such transaction. If the principal has entrusted the goods to the agent for some other purpose, the

agent is acting outside his authority in selling at all; and then the principal, whose goods have been disposed of without any authority at all so to do, is entitled to recover them in spite of the disposition.

Now, in the present case, the letter, taken as a whole, shews that the tabletop never was entrusted to Geddes to sell. He was forbidden in express terms to sell without further authority. He was not to sell the tabletop, but to keep it safely for the plaintiff until a further authority was given; and I think he sold, not violating instructions as to the terms on which he should effect a sale, but in spite of a prohibition to sell at all till some further authority should be given. At common law, therefore, I think the plaintiff is entitled to succeed.

Do the Factors Acts protect the defendant? I think not. I think it is an essential condition of the validity of a sale protected by them that the goods should have been intrusted to the agent for sale. I think the Factors Acts would apply, so far as relates to the business which Geddes was carrying on, the nature of the article dealt in, and what was usual in such a trade. But the defect that the article never was entrusted to him for sale is fatal.

I think there is another difficulty. In order to validate payment to the agent under 6 Geo. 4, c. 94, s. 4, it must be made in the ordinary course of business, that is, by cash or cheque or bill, as the case may be. I do not think that buying up a judgment from someone else, partly by delivery of a diamond of the defendant's own, can be considered as payment in the ordinary course within the section. And there is good reason for it. If the agent gets cash, he may be able to hand it to his principal; but if he does not get cash, and there is only a transaction of this kind, he cannot if impecunious pay the principal; it is out of his power to do so.

I am of opinion, therefore, that judgment must be entered for the plaintiff, with costs.

Judgment for the plaintiff.

Solicitor for plaintiff: *C. J. Davis.*
Solicitors for defendant: *Bolton & Mote.*

P. B. H.

1893
Nov. 1.

ULTZEN *v.* NICOLS.

Distinguished. TINSLEY *v.* DUDLEY [1951] 2 K. B. 18

Bailment—Restaurant Keeper—Coat of Customer.

In an action to recover damages for the loss of the plaintiff's coat by the negligence of the defendant, a restaurant-keeper, it appeared that the plaintiff entered the defendant's restaurant for the purpose of dining there. A waiter took the plaintiff's overcoat from him without being requested by him to do so, and hung it on a hook behind the plaintiff. The coat was stolen while the plaintiff was dining:—

Held, that there was evidence to warrant a verdict for the plaintiff. By Charles, J., on the ground that there was evidence from which a jury might properly find that the defendant was a bailee of the coat, and had been guilty of negligence while it was in his custody. By Wright, J., on the ground that, assuming a bailment of the coat, there was evidence of negligence on the part of the defendant as bailee.

APPEAL from the judge of the Westminster County Court. The plaintiff's claim, as disclosed in the particulars, was for the value of an overcoat given by him into the care and custody of the defendant or his servants, which they undertook to return, and failed to do owing to negligence and want of proper care on the part of the defendant or his servants. Alternatively, the claim was brought against the defendant as bailee of the coat.

The defendant was a restaurant-keeper, and the plaintiff, an old customer, went into the restaurant for the purpose of dining there. According to the plaintiff's own evidence, when he entered the room a waiter took his coat, without being asked, and hung it on a hook behind him. When the plaintiff rose to leave his coat was gone. On making a complaint to the manager the latter said that the place where the coat was hung was exactly the place from which the last overcoat was taken. For the defendant evidence was given that the custom of the establishment was that coats should be placed on chairs by the side of customers, and that they were only hung up at the customer's request; it was also denied that anything was said by the manager as to a previous loss of an overcoat. The learned judge refused to nonsuit the plaintiff; he explained to the jury that the defendant was not an innkeeper, and that the plaintiff must

shew that the loss was owing to the defendant having failed to exercise reasonable care, having regard to all the circumstances of the case. The jury returned a verdict for the plaintiff, and the defendant, by leave of the learned judge, appealed.

Longstaffe, for the defendant. There was no evidence of a bailment of the overcoat, which was never in the exclusive custody of the defendant or his servants. It does not appear that it was any part of the waiter's duty to take charge of the coats of customers, or that what he did was more than an act of courtesy towards the plaintiff. There is no suggestion that the theft was committed by any of the defendant's servants, and the defendant is under no greater liability towards his customers than a lodging-house keeper, who is not responsible to his lodger for a theft committed by a stranger: *Holder* v. *Soulby*. (1)

R. M. Bray, and *Beard*, for the plaintiff. There was ample evidence of a bailment of the coat. The waiter took the coat without being asked by the plaintiff to do so, and hung it up; the jury may therefore infer that he offered to take the coat, and that he did so in the ordinary course of his duty as a servant of the defendant. The question whether he did it in the course of his duty or merely as an act of politeness is purely a question for the jury, who were justified in finding that he took it out of the plaintiff's possession into his own care in the course of his duty to the defendant.

[WRIGHT, J. If the waiter had placed the coat on a chair by the plaintiff's side, would there have been a bailment?]

The case would not be so strong, but it would still be a question for the jury. The liability of the defendant bears a strong analogy to that of a railway company for the small luggage of a passenger when taken charge of by a porter, as determined in the case of *Richards* v. *London, Brighton, and South Coast Ry. Co.* (2); the position of the waiter, who took the coat without being requested by the plaintiff, is almost precisely similar to that of the railway porter in that case. [He also cited *Great Western Ry. Co.* v. *Bunch*. (3)]

(1) 8 C. B. (N.S.) 254; 29 L. J. (C. P.) 246.

(2) 7 C. B. 839; 18 L. J. (C. P.) 251.

(3) 13 App. Cas. 31.

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On the question of negligence, it is impossible to ignore the evidence of the conversation between the waiter and the manager. [He was stopped on that point.]

Longstaffe, in reply. The cases cited are distinguishable, for it was clear that it was part of the duty of the railway porter to assist the passengers with their luggage, while there is no evidence here that it was the waiter's duty to take the plaintiff's coat.

CHARLES, J. I think that this appeal must be dismissed. It raises two questions, first, whether the defendant was a bailee of the coat; secondly, whether there was on his part any negligence, owing to a want of reasonable care. As to the second point, there was, in my opinion, ample evidence of negligent conduct. The first point is more troublesome: whether the facts shew a bailment of the coat, or merely shew that it was taken by the waiter as an act of good-nature or an act of service, and without any intention of taking charge of it. Upon the evidence, I think that the jury were justified in finding that there was a bailment. The evidence really comes to this, that it was the waiter who relieved the plaintiff of his coat, and who selected the place where it should be put. As I suggested during the argument, there might have been a waiter at the door of the room, or in the vestibule, to take the coats of the guests before entering the dining-room. If such a man takes a customer's coat, the mere fact of his taking and disposing of it where he chooses would be evidence upon which a jury might properly find that the restaurant-keeper was a bailee of the coat, for such a system might obviously add to the popularity of the establishment, and would probably be adopted with that very object in view. In my opinion, there is only a difference in degree between the case of the restaurant-keeper providing a servant to take his customers' coats in that way and the present case.

WRIGHT, J. I agree with my learned brother that if there was a bailment there was sufficient evidence of negligence. As to the question of bailment, however, I think we have no juris-

diction to determine it. The point does not appear to have been clearly taken at the trial, and therefore, in my opinion, cannot be raised here. For the purpose of this decision I must assume that there was a bailment.

Appeal dismissed.
Leave to appeal refused.

Solicitors for plaintiff: *Beard & Sons.*
Solicitors for defendant: *Tyrrell Lewis & Co.*

W. J. B.

HADDOW *v.* MORTON. TROUT, CLAIMANT.

1893
Oct. 25, 26.

County Court—Interpleader—Goods taken in Execution—Deposit in Court of Value of Goods by Claimant—Money deposited paid out to Judgment Creditor—Effect of—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 156—*County Courts Forms*, 1889, *Form* 187.

Goods, which had been taken in execution of the judgment of a county court, were claimed by a third party, who, under the provisions of s. 156 of the County Courts Act, 1888, deposited the value of the goods with the bailiff to abide the decision of the judge upon the claim. On the trial of an interpleader issue the claim was not established, and the money deposited was paid out to the judgment creditor. The money so paid out being insufficient to satisfy the judgment, the judgment creditor caused the goods to be seized again for the purpose of realizing the balance of his judgment. Upon a second interpleader issue between the same parties:—

Held, that the judgment creditor was not entitled to seize the goods a second time, for that by taking out of Court the money deposited by the claimant, he estopped himself from thereafter disputing that as against himself the claimant was the owner of the goods.

APPEAL from county court of Surrey.

In January, 1893, the plaintiff recovered judgment in the county court against the defendant for 28*l.* and costs, and execution was issued thereon against the defendant's goods.

One, Ellen Trout, claimed the goods seized, and deposited with the bailiff, under the provisions of s. 156 of the County Courts Act, 1888 (1), the sum of 25*l.*, being the value of the

(1) By s. 156 of the County Courts Act, 1888: "Where any claim shall be made to or in respect of any goods taken in execution under the process of the Court, the claimant may deposit with the bailiff either the amount of the value of the goods claimed, . . . to be by such bailiff paid into court

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goods, to abide the decision of the judge upon an interpleader issue, and the goods were accordingly released. On March 21, the interpleader issue was tried, and, the judge having decided that the claimant had failed to establish her claim, the amount of the deposit was paid over to the plaintiff in part satisfaction of his judgment. Subsequently the plaintiff caused the same goods to be again seized for the unsatisfied balance of his judgment. Trout again claimed the goods, and again deposited with the bailiff a further sum of 25*l.* to abide the result of a second interpleader issue. On this second occasion Trout based her claim upon the ground that she had under the first seizure paid the bailiff the full value of the goods. The county court judge held that by the decision of the Court of March 21, the goods seized had been adjudged to be the property of Morton, the execution debtor (see Form 187 of the County Court Forms, 1889 (1)), that there was no evidence of the claimant having acquired a title to the goods since that decision, and that the plaintiff was consequently entitled to seize the goods for the purpose of satisfying the balance of his judgment.

The claimant appealed.

Lawson Walton, Q.C. (*Horace Browne*, with him), for the claimant. The object of s. 156 of the County Courts Act, 1888, was to give the claimant an option of allowing the goods to be sold by the

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to abide the decision of the judge upon such claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained, or may give to the bailiff in the prescribed manner security for the value of the goods claimed, and in default of the claimant so doing the bailiff shall sell such goods as if no such claim had been made, and shall pay into court the proceeds of such sale to abide the decision of the judge."

(1) Form 187:—

"Order on Interpleader Summons where the claim is not established.

"Between A. B. . . plaintiff
and
C. D. . . defendant
and
E. F. . . claimant.

"It is this day adjudged touching the claim of E. F. to certain goods and chattels [or moneys &c.] taken in execution in this action that the said goods and chattels [or moneys &c. or part thereof to wit &c. specifying them] are the property of the execution debtor."

bailiff, or of paying their value into court; and it was not intended that the execution creditor should be in a better position according as the claimant exercised his option one way or the other. The intention was that the deposit of the value in court should, in the event of the claimant failing to establish his claim, operate as a sale of the execution creditor's interest in the goods to the claimant. But if that is so then clearly the execution creditor could not seize the goods a second time, after he had once been paid their value in full. The county court judge was wrong in holding that the deposit did not represent the goods.

Cluer, for the plaintiff. The order upon the first interpleader issue adjudged the goods to be the property of the defendant, the execution debtor. Nothing has happened since then to transfer the property from the defendant to the claimant. The plaintiff is no doubt seeking an advantage to which he may not be morally entitled, but it is for the claimant to make out her title. The payment of the deposit out of court to the plaintiff did not operate as a sale. It is clear that the goods would be liable to seizure at the suit of another judgment creditor, then why not at the suit of the plaintiff?

Lawson Walton, Q.C., in reply, Although Form 187 uses the present tense, and adjudges that the goods seized "are the property of the execution debtor," it clearly is intended to refer to the state of things at the date of the seizure, not at the date of the decision. And the lodging of the deposit with the bailiff took place after the date of the seizure. The goods were by such deposit converted into money without the machinery of a sale, and the claimant is as much entitled to them as if she had bought them.

CHARLES, J. I think that this appeal must be allowed. The facts are that Haddow having recovered judgment against Morton and put in an execution, Trout claimed the goods seized, and paid their value into court under s. 156 of the County Courts Act, 1888, which provides that, in the event of the claimant failing to do so, or to pay the bailiff the costs of keeping possession, "the bailiff shall sell such goods as if no such claim had been made." The payment of the value into court was

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Charles, J.

with the object of avoiding a sale. Then the interpleader issue was tried and decided against the claimant, and the money was paid over to Haddow the execution creditor. Subsequently, Haddow, there being a balance of his judgment still unpaid, seized the goods again. Trout again paid the value of the goods into court under the same section. And the question we have to decide is whether Haddow is entitled to this second sum as well as to the first? It was contended that he was, upon the ground that the order of the county court judge upon the first interpleader issue adjudged that the goods were the property of Morton the debtor, that nothing had happened since that order to take the property out of the debtor, and that consequently Haddow was entitled to levy the second execution. The county court judge took that view and gave judgment against the claimant. I think that the judge was right in saying that the payment into court of the first deposit did not transfer the property in the goods to the claimant. It would not have operated to protect them from seizure at the suit of a second execution creditor of the defendant. But I think nevertheless that, although a different execution creditor might have lawfully seized the goods, the same execution creditor cannot do so. The amount of the deposit was the whole value of the goods, and the same execution creditor cannot, after receiving their value, be allowed to put in a second execution, and so get their value twice over.

WRIGHT, J. I am of the same opinion. The judgment creditor took the goods in execution as those of the debtor. Then there was a claim and the bailiff interpleaded. In the ordinary course the goods would have been sold by the bailiff, and in that case it is clear that the creditor could not have got the money twice over. But the claimant in order to prevent a sale exercised her option of paying the value into court under s. 156. The question is what was the effect of her so doing? I agree that by the payment into court she did not acquire any property in the goods, but I think that the judgment creditor, by taking out of court the money paid in by the claimant, elected to accept the money in lieu of the goods, and was thereby

estopped from afterwards denying that as against himself the goods were the goods of the claimant.

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Appeal allowed.

Solicitor for execution creditor: *H. R. Jones.*
Solicitor for claimant: *F. A. K. Doyle.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1893 *Nov.* 1.

NORTHEY STONE COMPANY *v.* GIDNEY.

County Court—Jurisdiction—"District within which Cause of Action wholly or in part arose"—Goods Sold and Delivered—Non-payment within District in which Action brought—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *s.* 74.

In an action to recover the price of goods sold and delivered, the default in payment is part of the cause of action. The county court within the district of which the payment ought to be made has therefore, under s. 74 of the County Courts Act, 1888, jurisdiction over such an action, although the defendant resides and the contract was made and the goods delivered without the jurisdiction.

APPEAL of the defendant from the refusal of Collins, J., at chambers, to issue a writ of prohibition to the judge of the Bath County Court on the ground that no part of the cause of action arose within the jurisdiction of that Court.

The action was brought to recover the balance of the price of goods sold and delivered. The plaintiffs carried on business in Bath; the defendant resided in Essex. The contract for the sale of the goods was made in Essex, and the goods were delivered to the defendant in Essex. From invoices sent with the goods it appeared that payment for them was to be made at Bath. (1) The action was brought by leave of the registrar in the Bath County Court.

By s. 74 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), every action may be commenced, by leave of the judge or registrar,

(1) This fact was elicited during the argument in the Court of Appeal. In the Divisional Court no mention was made of the invoices, and it was assumed throughout that there was no stipulation in the contract as to the place of payment.

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in the Court in the district of which the cause of action or claim wholly or in part arose.

Bower, for the defendant. There is no jurisdiction in the Bath County Court to entertain the action, for no part of the cause of action arose within the district of that Court. If payment was to be made within the jurisdiction, non-payment is no part of the cause of action. In *Read* v. *Brown* (1), the Court of Appeal, approving the definition of the phrase "cause of action" in *Cooke* v. *Gill* (2), defined it as being "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court." In an action for the price of goods sold and delivered the only matters necessary to be proved by the plaintiff are the contract and the delivery of the goods; payment must be affirmatively alleged and proved as a defence by the defendant.

[WRIGHT, J. Is not breach of the contract to pay a part of the cause of action? It is what gives the plaintiff his right to sue.]

No; every analogy that can be drawn from the old procedure is against such a contention. Non-payment need not be alleged, for that would be to allege a negative, and no negative can be part of any cause of action; non-payment is not a fact which, if alleged and traversed, would have to be proved by a plaintiff in order to entitle him to judgment.

[He also cited *Bell* v. *Antwerp, London and Brazil Line* (3), *Hawes* v. *Paveley*. (4)]

Edward Pollock, for the plaintiffs, was not called upon.

CHARLES, J. In my opinion this is a very plain case indeed, and the appeal should be dismissed. The action is brought to recover the balance of the price of goods sold and delivered. According to the law applicable to contracts, there being no special stipulation as to the place of payment, the defendant must pay at Bath, where his creditors, the plaintiffs, live. The action has been brought in the Bath County Court, and a ques-

(1) 22 Q. B. D. 128.
(2) Law Rep. 8 C. P. 107.
(3) [1891] 1 Q. B. 103.
(4) 1 C. P. D. 418.

tion arises on s. 74 of the County Courts Act, 1888, which provides (inter alia) that by leave of the judge or registrar an action may be commenced in the Court in the district of which the cause of action wholly or in part arose. In the present case payment was to be made at Bath, and it is contended on behalf of the defendant that non-payment is neither the cause of action nor part of the cause of action. The meaning of the expression "cause of action" was much discussed in cases arising under the Common Law Procedure Act, 1852, though it is true that the decisions are not entirely applicable to this case, for in that Act only the expression "cause of action" was used; while the Act now under discussion uses the words "wholly or in part" when dealing with the place where the cause of action arose. In those times the Courts differed, it is true, as to whether the breach of a contract was the whole cause of action; but beyond doubt they were all of opinion that it was part of it. The meaning of "cause of action" in s. 18 of the Common Law Procedure Act, 1852, was held in *Jackson* v. *Spittall* (1) to be the act on the part of the defendant which gave the plaintiff his cause of complaint; and whilst I do not say that non-payment is the whole cause of action, it is clearly part of it. A long argument has to-day been addressed to us founded on rules of pleading, chiefly as to what it was necessary to prove under the old system in an action for goods sold and delivered. Payment, it is true, had at that time to be specially pleaded; but it does not follow that non-payment for goods was not part of the cause of action.

WRIGHT, J. I am of the same opinion.

Appeal dismissed.

W. J. B.

The defendant appealed.

Nov. 13. *Bower*, for the defendant. His argument and the authorities which he cited were the same as in the Court below.

Edward Pollock, for the plaintiffs, was not called upon.

(1) Law Rep. 5 C. P. 542.

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NORTHEY STONE COMPANY v. SIDNEY.

THE COURT (Lord Esher, M.R., Lopes, L.J., and Kay, L.J.) held that non-payment for the goods was part of the cause of action; that the terms of the invoices sent with the goods shewed that by the contract they were to be paid for in Bath; and, therefore, that part of the cause of action arose at that place. They therefore affirmed the order of the Queen's Bench Division.

Appeal dismissed.

Solicitors for plaintiffs: *Young, Jones & Co.*
Solicitor for defendant: *A. A. Timbrell.*

E. L.

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Nov. 4, 6.

LEWIS *v.* OWEN.

County Court—Appeal—Fine for Assaulting Bailiff in Execution of Duty—Contempt of Court—"Matter"—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *ss.* 48, 120, 186.

No appeal lies from an order of a county court judge imposing a fine under s. 48 of the County Courts Act, 1888, for an assault upon an officer of the Court while in the execution of his duty.

By the interpretation section (s. 186) of the County Courts Act, 1888, "'Matter' shall mean every proceeding in the Court which may be commenced as prescribed otherwise than by plaint; and 'Prescribed' shall mean prescribed by the County Court Rules for the time being."

Semble that a proceeding in respect of which there is a form of summons given in the forms appended to the County Court Rules is a "matter" within the meaning of s. 186, although there is no county court rule prescribing how it shall be commenced.

APPEAL from the county court of Carmarthenshire.

The complainant, Lewis, was on May 4, 1893, employed as bailiff of the county court to execute a distress warrant to levy certain tithe rent-charge which had been recovered against the defendant in the county court. For that purpose he proceeded to a field of which the defendant was owner and occupier, and, finding the gate locked, he endeavoured to get over the hedge, when the defendant thrust him back with the object of preventing him from levying the distress. The complainant thereupon took out a summons under s. 48 of the County Courts Act, 1888, against the defendant, for having assaulted him while in the

execution of his duty. The county court judge found that the complainant was in the execution of his duty at the time of the assault, and fined the defendant 5*l*. The defendant appealed to the Divisional Court on the ground the complainant had no right to get over the fence for the purpose of levying a distress, and was therefore not acting in the execution of his duty in so doing, and that the defendant was justified in resisting his entry.

Foa, for the complainant, took a preliminary objection to the hearing of the appeal. The order of a judge under s. 48 cannot be the subject-matter of an appeal. The subject of appeals is dealt with by s. 120, and there can be no right of appeal in a case which does not come within that section. The section provides that "If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity . . . the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court." The question then arises whether a complaint under s. 48 is a "matter" within the meaning of that section. Sect. 186 enacts that "In construing this Act or any future Act relating to county courts, unless there is anything in the subject or context relating thereto, the several words hereinafter mentioned shall have or include the meanings following: . . . . 'Matter' shall mean every proceeding in the Court which may be commenced otherwise than by plaint; and 'Prescribed' shall mean prescribed by the County Court Rules for the time being." There is no county court rule prescribing how a complaint under s. 48 is to be commenced. There is indeed a form of summons under that section given in the appendix of forms (Form 177); but a form is not a rule, and the definition of "matter" requires that the commencement of the proceeding should be prescribed by a rule. Secondly, assuming that the complainant is wrong on that point, and that the commencement of the proceeding under s. 48 is sufficiently prescribed by the rules to render it a "matter" within the definition, still the definition is not to be applied to the construction of any section in the subject or context of which there is

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anything repugnant thereto. But in the context of s. 120 there is such a repugnance. An assault upon the officer of a Court while executing the orders of the Court is a contempt of Court: per Mellor, J., *Reg.* v. *Lefroy.* (1) And, further, it is a contempt of a criminal character, and the order imposing a fine under s. 48 is by way of punishment for a crime. In *O'Shea* v. *O'Shea* (2), Cotton, L.J., explains the distinction between contempts which are criminal and those which are not, and points out that in ordinary cases of commitment for contempt the test whether the commitment is a criminal proceeding or not is whether it is by way of punishment or for the purpose of enforcing the party in contempt to do something for the benefit of the other party. Applying that test, the imposition of the fine under s. 48 is a criminal proceeding. But it seems clear from the context of s. 120 that the term "matter" therein was only intended to include civil proceedings inter partes, and not proceedings of a criminal nature. The definition, therefore, in s. 186 does not apply to the present case, and an order under s. 48 is not a "matter" within s. 120, and consequently is not subject to appeal.

Upward, for the defendant. There is a right of appeal from the judge's order. "Matter" in s. 120 includes everything which is not included in "action."

CHARLES, J. This is an appeal from a county court, and an objection to our entertaining the appeal was taken on behalf of the respondent on the ground that under the circumstances of the case the decision of the county court judge was not an appealable matter. Whether that objection is well founded or not depends upon the construction which ought to be placed upon s. 48 of the County Courts Act, 1888, read in connection with ss. 120 and 186. The facts of the case are that the complainant, a bailiff of the county court, was assaulted by the defendant while endeavouring to distrain under the order of the county court judge for some tithe rent-charge which had been recovered in the county court. Having been so assaulted, he took out a summons under s. 48, which provides as follows: "If

(1) Law Rep. 8 Q. B. 134, at p. 139. (2) 15 P. D. 59, at p. 62.

any officer or bailiff of any county court shall be assaulted while in the execution of his duty . . . the person so offending shall be liable to a fine not exceeding five pounds, to be recovered by order of the judge, or on summary conviction in manner provided by the Summary Jurisdiction Acts." The judge found that the bailiff was acting in the execution of his duty at the time when the assault was committed, and fined the defendant 5*l*. It is said by the appellant that there is an appeal from that decision by s. 120 of the County Courts Act, 1888, which section enacts that "If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity . . . the party aggrieved . . . may appeal." That section undoubtedly did enlarge the right of appeal, the words "or matter" being new words introduced for the first time in that section. In order to ascertain the meaning of those words "or matter" we must turn to s. 186, by which it is enacted that "In construing this Act . . . unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have or include the meanings following: . . . 'Matter' shall mean every proceeding in the Court which may be commenced as prescribed otherwise than by plaint; and 'Prescribed' shall mean prescribed by the County Court Rules for the time being." By s. 164 power is given to the county court judges whom the Lord Chancellor may appoint for that purpose to frame rules, orders, and forms. It is true that the Rule Committee of the judges have not actually made any rule regulating the procedure under s. 48, but they have provided a form of summons (Form 177) whereby a person offending against s. 48 is to be brought before the county court judge. I think, therefore, that the commencement of the proceeding under s. 48 is sufficiently prescribed by the rules to satisfy s. 186, and that upon this purely technical point the respondent is not entitled to succeed.

The respondent's main objection to the appeal, however, was one of substance. The fine imposed by the judge under s. 48 is by way of punishment for a contempt of Court. That an assault upon an officer of the Court when in the execution of his duty is a contempt of Court is a proposition for which

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Charles, J.

authority is hardly needed; but, if it were needed, such authority would be found in the judgment of Mellor, J., in *Reg.* v. *Lefroy*. (1) And, if the test given by Cotton, L.J., in *O'Shea* v. *O'Shea* (2) be applied, it is a contempt of a criminal kind. Now, the interpretation which is put upon the word "matter" in s. 186 is, by the earlier clause of that section, only to be applied where there is nothing "in the subject or context repugnant thereto." But the context of s. 120 in which that word "matter" is to be found shews that that section was only intended to deal with civil actions and matters, and consequently its context would be wholly repugnant to an interpretation of the word "matter" in that section which would include a criminal proceeding such as that provided by s. 48. I think, therefore, that we have no jurisdiction to entertain this appeal, and that the appeal must be dismissed.

WRIGHT, J. I am of the same opinion, and for the same reasons. It appears to me that the power of punishment by fine which is given by s. 48 is in the nature of a disciplinary jurisdiction, and not of a jurisdiction to deal with matters inter partes; and the appeal section, s. 120, seems to be more properly directed to matters arising inter partes. I think that the language of s. 48 points to the conclusion that it was intended that the county court judge should deal with the offender finally.

Appeal dismissed.

Solicitors for appellant: *Holt, Beever & Co., for Evans & Stephens, Cardigan.*

Solicitor for respondent: *Solicitor to the Treasury.*

J. F. C.

(1) Law Rep. 8 Q. B. 134, at p. 139. (2) 15 P. D. 59, at p. 62.

[IN THE COURT OF APPEAL.]

C. A. 1893 *Oct.* 31.

BACHE, APPELLANT; BILLINGHAM, RESPONDENT.

Friendly Society—Dispute—Arbitration—Misconduct of Arbitrators—Decision of Arbitrators—Jurisdiction of Justices where no Decision—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 22.

In an arbitration between a member of a friendly society and the society, arising out of a claim for sick-pay the arbitrators appointed under the rules of the society, after hearing the claimant, heard the evidence of two witnesses, in the absence of the claimant, who was excluded from the room, and given no opportunity of cross-examining the witnesses. By one of the rules of the society, "where no decision is made on a dispute within forty days after application for reference to arbitration, the member may apply to a Court of summary jurisdiction." The member applied to justices, who decided that, the arbitration having been improperly conducted, the decision of the arbitrators was void, and that consequently the justices had jurisdiction to hear and determine the dispute. On appeal on a special case stated by the justices:—

Held (reversing the judgment of the Queen Bench Division) that as the arbitrators had given a decision which was valid until set aside, the jurisdiction of the justices to hear the complaint did not arise.

Reg. v. *Grant* (14 Q. B. 43) distinguished.

APPEAL from a decision of the Queen's Bench Division on a special case stated by justices. A complaint was preferred by the respondent Billingham against the appellant Bache, as secretary of Court Foresters' Home, No. 4196 Branch of the Dudley and Cradley Heath District of the Ancient Order of Foresters Friendly Society, that the respondent, being a member and being disabled from work, was in accordance with the rules of the society entitled to 10*s.* per week sick-pay, and that there was due to him £5 10*s.*

On the hearing it was proved that the complainant was a member of the society and that he had met with an accident that incapacitated him from work.

By the rules it appeared that one of the objects was the payment of sick-pay to members, and the rules contained provisions for the appointment of arbitrators and the reference of all disputes to them in the following terms: "20. Arbitration Committee. At a regular meeting of the Court, held in the month of January or February, there shall be twelve members elected as an

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arbitration committee, who shall perform the functions of such committee until the next annual change. The functions of this committee shall be those authorized under the 2nd section of general law 87, and the said committee shall decide all disputes with the court, or an officer thereof, charges, complaints, or claims by a member, or person claiming through, or on account of a member, or under the rules, subject to further appeal by either party to the arbitrators of the Dudley and Cradley Heath Districts, and after that to the final arbitrators, as provided for by the 88th and 90th general laws. The decision of the final arbitrators when appealed to is binding and conclusive upon all parties without further appeal, and is not removable into any Court of law, or restrainable by injunction, and application for the enforcement thereof may be made to the county court pursuant to s. 22 of the Friendly Societies Act, 1875. Where no decision is made on a dispute within forty days after application for reference to arbitration, the member or person aggrieved may apply to the county court, or to a court of summary jurisdiction under the Act."

Objection was made on behalf of the appellant to the jurisdiction of the justices to hear the complaint, on the ground that the matter in dispute had been referred to and determined by arbitrators under the rules. On behalf of the respondent, it was said that he was not bound by the decision of the arbitrators, in consequence of the manner in which the arbitration had taken place. The paragraph of the special case which related to the conduct of the arbitration was as follows: "In consequence of this notice (a forty days' notice by the respondent that he would take legal proceedings) the court summoned the respondent to a meeting of the arbitration committee on the 28th day of October, 1892, and the respondent duly attended. It was proved in evidence that, after hearing the respondent's statement, two witnesses were called on behalf of the court, and against the respondent, and were examined before the arbitration committee in the absence of the respondent, who was purposely excluded from the room during the time their statements were taken, and had no opportunity of cross-examining them, or of replying to their statements, and that the arbitration committee at once

adjudicated upon the matter, and omitted to acquaint the respondent with the nature of the evidence given against him, and, before calling him into the room, decided that he was not entitled to the sick-pay claimed by him."

The justices decided that the arbitration had been improperly conducted, and was void and of no effect, and that by virtue of s. 22 (*d*) of the Friendly Societies Act, 1875 (1), they had jurisdiction to hear and determine the dispute, and that the respondent was entitled to the amount he claimed. Against this decision the appellant appealed to the Queen's Bench Division, and the Court (Pollock, B., and Kennedy, J.) gave judgment, on the authority of *Reg.* v. *Grant* (2), upholding the decision of the justices.

The appellant appealed.

A. T. Lawrence, for the appellant, in support of this appeal. The jurisdiction of the justices only arose if there had been no decision on the dispute. The irregularity in the conduct of the arbitration did not render the decision of the arbitrators void. It was open to the respondent either to have set aside the award as irregular, or to have appealed under the rules of the society, but it was not open to him to say that there was no award: *Whitmore* v. *Smith* (3); *Thorburn* v. *Barnes*. (4) The case of *Reg.* v. *Grant* (2) is different from the present, for there under the statute the justices had to decide whether their jurisdiction arose or not, and for that purpose were bound to inquire if there

(1) 38 & 39 Vict. c. 60, s. 22: "Every dispute between a member or person claiming through a member or under the rules of a registered society, and the society, or an officer thereof, shall be decided in manner directed by the rules of the society, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law or restrainable by injunction, and application for the enforcement thereof may be made to the county court.

"Provided as follows:—

"(*d*) Where the rules contain no direction as to disputes, or where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply either to the county court, or to a court of summary jurisdiction, which may hear and determine the matter in dispute."

(2) 14 Q. B. 43.

(3) 7 H. & N. 509.

(4) Law Rep. 2 C. P. 384.

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was an award in conformity with the Act. Here the only inquiry possible is whether there is an award, and the justices had no jurisdiction to inquire whether it was bad.

Johnstone Watson, for the respondent. The arbitration committee were acting contrary to the first principles of justice in not hearing Bellingham. "Decision" in the Act means a decision that can be supported in law, and the justices were right in inquiring whether there was such a decision in existence. The respondent could not apply to the High Court to set aside the award: *Re An Arbitration between Gollings and the Tradesmen's Friendly Society, Peterborough* (1) and he was entitled to treat it as a nullity and apply to the justices to determine the dispute.

LORD ESHER, M.R. I cannot agree with the judgment of the Divisional Court in this case. It seems to me that what happened was, that Billingham had a claim against the society which was referred under the rules to the committee, who were to enter upon an arbitration and to decide the matter. In so doing they were arbitrators, and if they made a mistake either in law or in fact the Courts cannot interfere with them. There is given by the rules an appeal to other branches of the society; but there is no appeal to the Court against a wrong decision of arbitrators chosen by the parties themselves. Billingham then had a decision against him by the arbitrators to whom he had agreed to refer the matter of his complaint, and he asked the justices to hear the case again. Why? Not because the committee had not decided, but because they had decided improperly, that is to say, that they heard him, but then they examined witnesses against him when he was not present, and did not give him the opportunity of cross-examining those witnesses. That is a wrong procedure in the arbitration; but nevertheless they did that in order to come to a decision, and they came to a decision. When he went before the magistrates he could not properly say that there had been no decision by the arbitrators. He could only say, that they had not decided according to law and justice. That does not make the decision void. It only gives ground for a Court to

(1) 64 L. T. (N.S.) 775.

set it aside or for an appeal. It is said now that the Court could not set aside such an award. So much the worse for Billingham if they could not, because the only remedy then is by way of appeal, and that is not to the magistrates; it is to other arbitrators of the society. It does not seem to me necessary to determine in this case whether the Court could set aside the award. If they could, no application has been made to them to do it, and until that has been done there is an award good and valid. But then the Divisional Court have treated the matter as a case within the judgment in *Reg.* v. *Grant.* (1) I think the Court misconstrued the decision in that case, for the jurisdiction of the arbitrators there depended upon a condition precedent which must have existed before they could enter upon the arbitration so as to decide it. The justices were therefore right in inquiring into those preceding facts in order to determine whether they existed so as to give them jurisdiction or not. That is not the case here. There was no such preliminary fact to be inquired into. The only facts necessary to exist in this case were that there should be a dispute between Billingham and the society, and that did exist, and the magistrates could not decide that it did not. I think the learned judges in the Court below have mistaken the application of that case, that this case is within the other cases cited, and that therefore the magistrates had no jurisdiction at all to inquire into the matter. I think we must differ from the Divisional Court and allow the appeal.

LOPES, L.J. I, too, am of opinion that the decision of the Court below was wrong. The question raised in the case was, whether the magistrates had jurisdiction to hear the complaint. That depends upon s. 22 of the Act of 1875. That section provides for disputes and how they are to be dealt with, whether those disputes are between members or branches of the society, and sub-s. (*d*) is in these words: "Where the rules contain no direction as to disputes, or where no decision is made"—these are the material words—"on a dispute, within forty days after application to the society for a reference under its rules, the

(1) 14 Q. B. 43.

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member or person aggrieved may apply either to the county court or to a court of summary jurisdiction"—that is, the justices—"which may hear and determine the matter in dispute." Applying that rule to the present case, there would be no jurisdiction in the justices in this case unless there was no decision made by the arbitrators. Now, was there a decision made by the arbitrators? I think there was. They clearly decided the case; but it is said that they decided it improperly, in not giving Billingham an opportunity of cross-examining the witnesses, who were examined behind his back. If this were an ordinary arbitration, I take it that it would be good ground for applying to the Court to set it aside upon the ground of the misconduct of the arbitrators; but, if an action had been brought upon that award, it would not have been a good plea to have said, there was no award. The objection could not have been taken in answer to an action upon the award, but only on an application to set it aside. The case of *Thorburn* v. *Barnes* (1) and other cases make that clear. It is said here, that course could not have been taken with regard to the award, because there is a provision that the award is not to be removeable into any court. I do not know how that may be; but if so, as the Master of the Rolls says, all the worse for Billingham; because that is a thing which he is not in a position to take advantage of. The real point is, Was there a decision by the arbitrators? I am clearly of opinion there was. They decided the matter brought before them, and the jurisdiction of the magistrates was ousted. The Court below seem to have proceeded upon a case of *Reg.* v. *Grant.* (2) I think they have mistaken the effect of that case. In that case the magistrates came to the conclusion, and I think very rightly, that there was no decision; because there, there was a condition precedent that the arbitrators, before arriving at a decision, should hear evidence on both sides; and it was clear to the magistrates that that course had not been adopted, and therefore the condition precedent, upon which the decision was to go, was not observed, and the magistrates were justified in saying there was no decision, and that their jurisdiction arose. I think, therefore, that this appeal should be allowed.

(1) Law Rep. 2 C. P. 384. (2) 14 Q. B. 43.

KAY, L.J. With all deference to the learned judges in the Court below, I agree in what has been said by the Master of the Rolls and my brother Lopes. Sect. 22 of the 38 & 39 Vict. c. 60, seems to be copied into the rules of this society, for the 20th rule, which relates to arbitrations, ends thus: "Where no decision is made on a dispute within forty days after application for reference to arbitration, the member or person aggrieved may apply to the county court or to a court of summary jurisdiction under the Act." Now the respondent has applied to the court of summary jurisdiction; and, of course, he was bound to make out there was no decision. The justices seem to have come to the conclusion there was no decision of the arbitrators, because they conceived that the arbitrators had misconducted themselves; but the law is plain, that the misconduct of the arbitrators, in making an award without hearing the defendant or his witnesses, does not make the award absolutely invalid, so that in an action upon the award it could be pleaded that there is no such award; it is only a ground for setting the award aside. The case to which I refer upon that subject is *Braddick* v. *Thompson* (1), and there are many other cases to the same effect. There was, therefore, a decision of the arbitrators. That might or might not have been impeached, but there was no possibility of appealing to the summary jurisdiction of the justices while that decision stood. I think it is probable that the learned judges in the Court below would have come to that conclusion if they had not been impressed with the view that it was inconsistent with *Reg.* v. *Grant* (2); but, at p. 63 of the report, the ground of that decision is stated in these words: "Statute 10 Geo. 4, c. 56, s. 27, enacts that an award made according to the true purport and meaning of the rules of the society shall be final and binding. The rule of the society in question, relating to arbitrators, declares that the arbitrators shall hear evidence on both sides, and their decision binding to all parties shall be final. Upon this statement there is good reason for saying that arbitrators who refused to hear the evidence of one side did not make an award according to the true meaning of the rules of the society, and, therefore, did not make an award final and binding within the terms and intention of

(1) 8 East, 344. (2) 14 Q. B. 43.

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statute 10 Geo. 4, c. 56, s. 27. Statute 4 & 5 Wm. 4, c. 40, s. 7, giving jurisdiction to the justices in case of the neglect or refusal of the arbitrators to make an award, recites statute 10 Geo. 4, c. 56, s. 27, and intends an award final and binding within the meaning of that statute. It seems to follow that the justices have jurisdiction where the award is not in this sense final and binding." The rule here is entirely different, and the statute is differently worded. Here is an award which is primâ facie valid, and can only be rendered invalid if an application should be made (perhaps it cannot be made) to set it aside, and it is set aside. Until that is done the award is a decision, and the jurisdiction of the justices never arose. I therefore think this appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Shaw, Tremellen, & Kirkman, for S. Ward, Dudley.*

Solicitors for respondent: *C. Robinson & Co., for W. Waldron, Brierley Hill.*

A. M.

C. A. 1893 *Nov.* 14.

[IN THE COURT OF APPEAL.]

LEAROYD *v.* BRACKEN.

Stock Exchange—Sale or Purchase of Stock or Marketable Security—Contract Note sent to Principal—Omission to send Contract Note—Right of Broker to Recover Commission—Customs and Inland Revenue Act, 1888 (51 *&* 52 *Vict. c.* 8), *s.* 17, *sub-s.* 1.

A broker who has made purchases or sales on the Stock Exchange for his principal is not prevented from recovering commission on such purchases or sales by an omission on his part to transmit to his principal any stamped contract notes in conformity with the Customs and Inland Revenue Act, 1888, s. 17, sub-s. 1. (1)

APPEAL from a judgment of the Queen's Bench Division on an application to set aside a finding of an official referee.

The plaintiff was the trustee of the property of John Caw, junior, a bankrupt. The action was brought to recover the

(1) See now the Stamp Act, 1891 (54 & 55 Vict. c. 39, ss. 52, 53), which consolidates the previous statutes.

balance of an account for moneys paid by John Caw, junior, as a broker, for and on account of the defendant, and for brokerage. The action came before an official referee, who found in favour of the plaintiff.

The defendant moved in the Queen's Bench Division to set aside the finding of the official referee on various grounds, among others that no contract notes were made, stamped, executed, and forwarded to the defendant by John Caw, junior, in respect of the transactions on which the claim was founded.

The Divisional Court (Wills and Charles, JJ.) affirmed the finding of the official referee.

The defendant appealed.

Nov. 13. *Reginald Neville*, for the defendant. The plaintiff is not entitled to recover commission upon the carrying over of these stocks. The transaction by which each carrying over is effected amounts to a sale and repurchase of the stock. By the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 69, sub-s. 2, 3, it is provided that "every person who makes or executes any contract note chargeable with duty, and not being duly stamped, shall forfeit the sum of twenty pounds." "No broker, agent, or other person shall have any legal claim to any charge for brokerage, commission, or agency, with reference to the sale or purchase of any stock or marketable security of the value of five pounds or upwards mentioned or referred to in any contract note, unless such note is duly stamped." By the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 26, it is provided that "the term 'contract note,' wherever used in the Stamp Act, 1870, shall for the purposes of that Act mean exclusively an advice note sent by a broker or agent to his principal." By the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 16, sub-s. 1, it is provided that, "in lieu of the stamp duty of one penny now payable on a contract note, where such note advises the sale or purchase of any stock or marketable security of the value of one hundred pounds or upwards, there shall be charged a duty of sixpence." And by s. 17, sub-s. 1, "the term 'contract note' means the note sent by a broker or agent to his principal . . . advising him of the sale or purchase of any stock or

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marketable security, and any person who effects any such sale or purchase as a broker or agent shall forthwith make and execute a contract note and transmit the same to his principal, and in default of so doing shall forfeit the sum of twenty pounds." In the present case the broker did not make or transmit any contract notes when the stocks were carried over. It is submitted that this was an illegality which rendered the contract as between himself and the defendant unenforceable. As a general rule, a penalty imposed by statute on the doing or not doing of a particular thing imports a prohibition: *Bartlett* v. *Vinor* (1), and other cases cited in the notes to *Collins* v. *Blantern* (2); *Ex parte Neilson* (3); *Bensley* v. *Bignold.* (4) It would be an anomaly that if the broker sent an advice note unstamped but containing the terms of brokerage he could not recover the brokerage, but that he could if he sent no advice note. The enactment contained in s. 17 of the Customs and Inland Revenue Act, 1888, must be taken to import a prohibition of a contract for payment of commission to a broker who fails to comply with its provisions. The cases in which a penalty has not been held to imply a prohibition of the contract, such as *Brown* v. *Duncan* (5), *Johnson* v. *Hudson* (6), *Cope* v. *Rowlands* (7), and *Smith* v. *Mawhood* (8), are all cases in which the failure to take out a personal licence required by the excise laws was held not to render void contracts with the unlicensed person. Such a case is quite different from a case where a particular contract is forbidden under a penalty.

Manisty, contrà. The broker carries out his contract by means of the contract notes that pass between him and the broker with whom he deals; the note sent to his principal is no part of that purchase or sale. [He was stopped.]

LORD ESHER, M.R. In this case the trustee in bankruptcy of a broker has brought an action against a client of the broker for money paid on transactions carried through by the broker for his client and for commission on those transactions. The broker did this business for the client, and made contracts which were

(1) Carth. 251.
(2) 1 Sm. L. C. 9th ed. 398.
(3) 23 L. J. (Bk.) 12.
(4) 5 B. & A. 335.
(5) 10 B. & C. 93.
(6) 11 East, 180.
(7) 2 M. & W. 149.
(8) 14 M. & W. 452.

valid and binding on his principal. Is there anything to prevent him from earning his commission or being repaid the money he has laid out? As to the latter, it is hopeless to contend that the broker was not entitled to be repaid, and the question before us is limited to the right to recover commission. The contract between the broker and his principal is, that the former shall make a valid and binding contract, and shall be entitled thereon to receive the usual commission. So far as concerns the validity of the contract, that which the broker has omitted to do has no effect. The Stamp Act, 1870, by s. 69, sub-s. 2, enacts that, every person who makes or executes any contract note chargeable with duty, and not being duly stamped, shall forfeit the sum of 20*l*. It has been pointed out that the contract note does not affect the bargain between the broker and his principal, but is an obligation affecting the broker.

The document passing between the broker and his client, though called a contract note, is really an advice note. The Act has imposed a duty on contract notes and a penalty for not stamping them; but that penalty is the only punishment for breach of the duty to stamp such a contract note which the legislature has thought proper to inflict. The broker was liable to that penalty every time he failed to send a contract note duly stamped; but that default of his has nothing to do with the contract between him and his principal, and was wholly independent of it.

Under these circumstances, there is nothing in the Act to take away the liability of the principal to pay the broker his commission.

LOPES, L.J. The contract between the parties in this case was wholly outside the Revenue Acts to which our attention has been directed. The clearest way to shew that is by bearing in mind that that contract may be made by word of mouth without any writing. The object of the Act was not to vitiate the contract if the provisions as to stamping a contract note were not complied with, but to impose a penalty, on default in so doing, for the protection of the revenue. I think the Court below took a right view of the case, and the appeal must be dismissed.

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KAY, L.J. I have come to the same conclusion. The action is brought by a trustee in bankruptcy to recover money paid by the bankrupt, a broker, in carrying out for his client transactions on the Stock Exchange, and for commission on those transactions. It is said that the payments that have been made on account, if treated as applied to the money paid, would cover that amount, so that the claim before us is one for brokerage and commission. It is argued that this latter amount cannot be recovered by reason of the Stamp Acts. By the Stamp Act, 1870, a duty is imposed on a contract note, and by s. 69 the duty may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the note is first executed. Clearly that does not apply to this case, because as regards the contract between the client and the broker there has been no contract note. In sub-s. 3 of the same section it is provided that "No broker, agent, or other person shall have any legal claim to any charge for brokerage, commission, or agency, with reference to the sale or purchase of any stock or marketable security of the value of five pounds or upwards mentioned or referred to in any contract note, unless such note is duly stamped." There was not any contract note in which the brokerage was mentioned; so that does not bring this case within the Act. Then comes the Act of 1878, which defines the term "contract note" used in the previous Act as an advice note sent by a broker or agent to his principal: so that such an advice note is the thing which is to be charged with a stamp duty under the Act of 1870. It has been said, and said truly, that that is no part of the contract entered into by the broker for the purchase or sale of that which he has been instructed to buy or sell. That proposition may be tested in this way. If the broker has purchased any stock, and the proper bought and sold notes have passed, his client could sue on that contract without putting the advice note in evidence. The last of the Acts which has been relied on is the Customs and Inland Revenue Act, 1888. By s. 17 of that Act, "the term 'contract note' means the note sent by a broker or agent to his principal (except where such principal is acting as broker or agent for a principal), advising him of the sale or purchase of any stock or marketable security, and any person who effects any

such sale or purchase as a broker or agent shall forthwith make and execute a contract note and transmit the same to his principal, and, in default of so doing, shall forfeit the sum of twenty pounds." It is said that the broker did not transmit such a note to his principal in this case. The effect of his not doing so is that he is liable to a penalty of 20*l.* Then it is said that in addition to the penalty, the bargain that the principal will pay commission is also void; but I cannot find that in the statute, and I cannot see how the penalty imposed by the statute can affect the contract between the principal and the broker. The bargain made between them need not be in writing; it may be oral; and these Stamp Acts do not affect that contract. The necessity to send and to stamp an advice note does not affect the contract between the principal and the broker; and I therefore think that the plaintiff is entitled to succeed on the action.

Appeal dismissed.

Solicitor for plaintiff: *Walter Helliwell, for Jubb, Booth, & Helliwell, Halifax.*

Solicitors for defendant: *Walker, Whitfield, & Harrison, for Humphreys & Hirst, Halifax.*

A. M.

[IN THE COURT OF APPEAL.]

LONG *v.* CLARKE AND ANOTHER.

Landlord and Tenant—Distress—Entry—Getting over Wall into Yard.

A bailiff, in order to effect a distress for rent in a house, went through the next house and into the yard at the back. He then climbed over the wall into the yard of the house in which he was directed to distrain, and entered and distrained:—

Held, a lawful distress.

Eldridge v. *Stacey* (15 C. B. (N.S.) 458) approved.

Scott v. *Buckley* (16 L. T. (N.S.) 573) questioned.

APPEAL from a judgment of Henn Collins, J., in an action to recover damages for trespass to the plaintiff's goods.

The plaintiff was holder of a bill of sale on furniture at No. 50, Gower Street, and had put a man in possession under

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the terms of the bill of sale. The defendant Clarke, as owner of the house, instructed his co-defendant Hawkins to distrain on the goods and chattels in the house for rent in arrear. Hawkins, being unable to get into the house by the front, went through the next house into the yard at the back. He then got over a wall (said to vary in height from five feet to over ten feet) into the yard at the back of No. 50, and entered that house by means of a window and distrained on the goods. The plaintiff paid out the distress, and sought to recover the money paid and damages, on the ground that the distress was illegal by reason of the broker having got into the premises over the wall. The learned judge gave judgment for the defendants.

The plaintiff appealed.

Cababé, for the plaintiff. The landlord in distraining in a house must shew that it was "ouverte," and he cannot shew that if there was no opening into the curtilage, for the curtilage enjoys the same immunity as the house. It may be true that, if he gets into the curtilage, there may be another outer door to a house or building within the curtilage which cannot be broken open: *Penton* v. *Brown* (1); *American Concentrated Must Corporation* v. *Hendry* (2); but that does not affect the fact that as under a demise of a house the curtilage passes: *Barnes* v. *Southsea Ry. Co.* (3), the landlord can only enter on the demised premises by the ordinary means of access: *Ryan* v. *Shilcock* (4), and can neither break into the curtilage nor enter otherwise than by a door or gate. The learned judge decided this case on the authority of *Eldridge* v. *Stacey* (5); but that case may possibly be distinguished on the ground that the fence over which the broker got may not have been a fence intended as a protection, which was the case here. If that case is not distinguishable, it is submitted that it was wrongly decided, and it is opposed to the decision of Byles, J., arrived at after consultation with the other judges of the Common Pleas in *Scott* v. *Buckley* (6), as to the illegality of getting over a wall to distrain.

(1) 1 Sid. 186.
(2) 62 L. J. (Q.B.) 338.
(3) 27 Ch. D. 536.
(4) 7 Ex. 72.
(5) 15 C. B. (N.S.) 458.
(6) 16 L. T. (N.S.) 573.

Jelf, Q.C., and *T. L. Wilkinson*, for the defendant Clarke, and *C. C. Scott*, for the defendant Hawkins, were not called on.

LORD ESHER, M.R. I quite agree that when speaking of a house in any sense connected with conveyancing the usual meaning applicable to conveyancing matters must be attached to it. In this case we are dealing with a landlord's bailiff distraining for rent. What is the ordinary law applicable to such a case? It gives a right to the landlord to do that which, if any other person did it, would be a trespass, and the question is whether what has been done in the present case is within what is permitted by the law of distress. When a landlord goes into a house to distrain, whether the door be open or shut, he does that which in any other person would be a trespass, and it is just the same if he merely walks across the land to the front door. The sole question is what limitations on the right of the landlord to go on the premises and distrain the law imposes on him. He cannot go into any building or into any house if he can only do so by breaking into it. He can go in at the door, which is the most obvious way of entering; but further, he can get in by a window if it is left open. There is no trespass in doing either of these acts, because he does not break in. So it is incorrect to say, as has been suggested, that the landlord cannot go into the house if he finds a hole in the side of it, and for the same reason, that in so entering he is not breaking in. This law is applicable to any building into which the landlord wants to get for the purpose of distraining, such as a warehouse, a stable, or a barn. Thus, supposing he enters a curtilage without breaking anything, still he cannot break into any stable or building within the curtilage which is locked.

This shews that under the law of distress the curtilage is no part of the house, and it is incorrect to say that he cannot go into the house if he finds a door or a window open because he has previously got over a wall or gate into the curtilage. Another defect in the plaintiff's case is this. Supposing the curtilage to be part of the house, the bailiff did not break into the curtilage. He did not break any door or anything else; he merely got over a wall. I see no difference between getting over a wall to get

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into the curtilage and getting on to the wall of the house in getting in at a window in it, and it seems to me to be plain that if a landlord can get into a curtilage without breaking anything he may do so, just as he can get into a window on the same conditions.

The decision in *Eldridge* v. *Stacey* (1) seems to me to be quite right, and the judgment of Bowen, L.J., in *American Concentrated Must Corporation* v. *Hendry* (2), which has been relied on, has not any bearing on the point before us. When that case came before the Court of Appeal, it was held to be clear on the facts that the door broken open was an outer door.

The case of *Scott* v. *Buckley* (3) is cited in support of the plaintiff's case; but there must be something omitted in the report, for I cannot think that Byles, J., who decided it, would have dissented from the decision in *Eldridge* v. *Stacey* (1), to which he himself was a party only three years previously. I think, therefore, the action properly failed, and the appeal must be dismissed.

LOPES, L.J. I am of the same opinion. A landlord may enter the demised premises to levy a distress, and may commit in so doing an act which in any one else would be a trespass, provided that he does not break open any outer door. He may walk over a garden or park to get to the building, which in any other person would be a trespass; but when he gets to the building, he cannot break open anything to gain access to it. In the word "building" I include a stable, a barn, or any other sort of building. The question raised in this case is whether the landlord or his bailiff may climb over a wall enclosing a yard, and thus get to the building, so as to be able to proceed by any unfastened door or open window to effect a levy in the house. It is clear to me that he could do so. The yard was no more part of the house than the garden or park which I have mentioned would be. The bailiff breaking nothing in getting into the yard has done nothing wrong. The case is similar to that of *Eldridge* v. *Stacey*. (1) It is hardly possible to imagine two cases more similar to one

(1) 15 C. B. (N.S.) 458. (2) 62 L. J. (Q.B.) 388.
(3) 16 L. T. (N.S.) 573.

another. It was there decided that there is no illegality in distraining for rent by climbing over a fence and so gaining access to the house by an open door. I see no distinction for this purpose between a fence and a wall. The judges who decided that case were Erle, C.J., and Williams, Byles, and Keating, JJ. The case of *Scott* v. *Buckley* (1) was relied on for the plaintiff, and certainly the head-note supports his contention. Looking, however, to the fact that it was decided by Byles, J., not long after the decision of the other case in which he took a part, I cannot think the report is correct, and I think that at least there must have been some distinction between the cases which has not been noticed in the report. However that may be, I think that the decision in *Eldridge* v. *Stacey* (2) should be supported, and consequently that the present appeal should be dismissed.

KAY, L.J. I agree with the contention of the plaintiff's counsel to this extent, that for many purposes a curtilage is part of a house, for by a devise or conveyance of a house the curtilage passes without being mentioned; but that consideration does not determine this case.

If there had been a door in the wall of the yard, and the landlord had effected an entrance by breaking it, I should have thought he would have exceeded the power given him by the law and become a trespasser, and even if the house-door had been open would have been a trespasser ab initio. It is not, however, necessary to decide that question. That is not what the bailiff did, for he got over the wall without breaking anything. In any one else the act of getting over the wall would have been a trespass, and the question is whether it is so in the case of the landlord or his bailiff. The land belongs to the landlord; but he has let it for a term, and has no right to enter, with this exception, that the law permits him to do so to distrain in the case of rent in arrear. If there were no wall, the landlord might walk over the land surrounding the house in order to reach it. The question is whether climbing over a wall to exercise his right to go on the land makes him a trespasser. If it does, he is a trespasser ab initio. No case has said so, and

(1) 16 L. T. (N.S.) 573.

(2) 15 C. B. (N.S.) 458.

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in fact if the word "wall" is substituted for "fence" in the decision in *Eldridge* v. *Stacey* (1), that case would be identical with the one we are considering. We are not bound by that decision; but Erle, C.J., in giving judgment, pointed out that none of the authorities cited warranted the conclusion that the distress was rendered unlawful by the broker getting over the fence, and in that view I concur.

Three years later there was a case of *Scott* v. *Buckley*. (2) As it reads in the report, it seems to be an authority contrary to that of *Eldridge* v. *Stacey*. (1) It was decided by Byles, J., who was a party to the judgment in the previous case, and I am driven to conclude that there was some fact not reported which made the two cases distinguishable. The only restriction that the law imposes on the right of the landlord to enter and distrain for rent is that to do so he must not break in. He has not done that in this case, but has got over a wall, committing in doing so no further trespass than he would have committed in walking across the land if there had been no wall there. I agree, therefore, that the plaintiff's case fails, and that the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *John Westcott.*

Solicitors for defendant Clarke: *Noon & Clarke.*

Solicitors for defendant Hawkins: *Lockyer & Dinn.*

(1) 15 C. B. (N.S.) 458. (2) 16 L. T. (N.S.) 573.

A. M.

GRIMSTON *v.* CUNINGHAM.

1893
Nov. 16.

Practice—Injunction—Breach of Contract—Theatrical Engagement—Contract to Act with a Company for a certain Period—Stipulation against Acting elsewhere.

Defendant, an actor, agreed with plaintiff, a theatrical manager, to act and to understudy as a member of plaintiff's company on tour in America for twenty-five weeks, or longer if required, but not more than forty weeks, subject to certain rules, by one of which no member of the company was allowed to act at any other theatre without permission. Shortly after the beginning of the tour plaintiff produced a play in America, in which defendant was not given a part to act, but was called on to understudy. A week later defendant wrote asking plaintiff to cancel the engagement, and this being refused defendant returned to England, and entered into an engagement and acted at a theatre in London. Defendant alleged in his affidavit that plaintiff had verbally promised that defendant should perform in certain parts, but had not kept such promise.

On an application for an injunction to restrain defendant from acting at any theatre other than where plaintiff's company played :—

Held, that the negative stipulation against acting elsewhere could be enforced by injunction, that the alleged verbal promise could not, in the absence of any circumstances shewing want of good faith on plaintiff's part, be considered in construing the contract, that the allotting of parts to defendant was no part of the consideration, that plaintiff had not failed to carry out his part of the contract, and an injunction ought to be granted.

Fechter v. *Montgomery* (33 Beav. 22) distinguished.

Appeal by the defendant from an order made by Bruce, J., at chambers, in the following terms: "It is ordered and directed that the defendant Philip Cuningham be restrained, and an injunction is hereby granted restraining him, from acting singing appearing and performing publicly at any theatre or place of entertainment other than those at which the plaintiff and his company play, without the permission of the plaintiff, or his manager, for a period of twenty weeks, or until the trial of the action, whichever shall first happen, or until further order."

The plaintiff was Mr. William Hunter Kendal Grimston (known professionally as Kendal), an actor and manager of a theatrical company, and the defendant was an actor.

From an affidavit by Mr. Long, the plaintiff's solicitor, which was used on behalf of the plaintiff, it appeared that on July 15,

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1893, the plaintiff and the defendant entered into the following agreement:—

"I hereby agree to engage with Mr. W. H. Kendal to act as a member of his company on tour in the provinces of Great Britain and Ireland, for a period of two weeks, or longer if required, prior to American tour commencing on or about September 4, 1893, at a weekly salary of 6*l.*, and to receive full salary for all matinées, and usual railway fares. A fortnight's rehearsal to be given prior to commencement of tour.

"And furthermore I agree to engage with Mr. W. H. Kendal to act and to understudy as a member of his company, on tour in the United States of America and Canada, for a period of twenty-five weeks, or longer if required, but not to exceed forty weeks, commencing on or about October 9, 1893, at a weekly salary of 10*l.*, and ordinary first-class railway and steamship fares, said week to consist of seven performances, and to receive full salary for all performances over seven. A fortnight's rehearsal to be given prior to opening in New York.

"And it is further understood that Mr. W. H. Kendal has the option of retaining my services (on giving one month's notice prior to termination of American tour) for a tour in the provinces of Great Britain and Ireland, for a period of not less than twelve weeks, or longer if required, commencing on or about September 14, 1894, at a weekly salary of 7*l.*, and to receive full salary for all matinées, and usual railway fares.

"I make this engagement subject to the rules and regulations thereof, which are annexed hereto.

(Signed) "Philip Cuningham."

"I hereby agree to engage Mr. Philip Cuningham for the tours above mentioned, subject to the rules and regulations which are annexed hereto.

(Signed) "W. H. Kendal."

The only one of the rules and regulations material to the present case was the third, which was as follows: "No member of the company is allowed to act sing or appear publicly at any other theatre or place of entertainment without special permission of the management. A breach of this article incurs a

forfeiture of engagement, and renders the member liable to immediate dismissal."

It further appeared from the affidavits that the defendant went to America, arriving on September 28, 1893, that in October the plaintiff's company produced in America a play called "The Second Mrs. Tanqueray," and that on October 16 the defendant wrote the following letter to the plaintiff:—

"Owing to the great success of 'The Second Mrs. Tanqueray,' it now seems very improbable that you will have practically any requirement for my services, and I should feel obliged to you if you would cancel my engagement. As you will remember, you gave me to understand clearly in Mr. Blackmore's office that I should play in 'The Second Mrs. Tanqueray,' 'The White Lie,' and 'The Silver Shell,' which assurance I feel certain was given in perfectly good faith on your part. However, as circumstances have shaped themselves I now see no possibility of your being able to give me the parts which you mentioned in these pieces, and as I cannot afford at this stage of my career to spend a period probably of eight months in understudying, I should be very glad if you will kindly let me know the earliest date at which you can release me, so that I can return to England."

The plaintiff declined to release the defendant from his engagement. On October 21 the defendant sailed for England, and about the beginning of November he entered into an engagement at the Opéra Comique Theatre, and appeared in a play produced there.

The plaintiff instructed his solicitors by telegraph, and on November 8 a writ was issued claiming an injunction and damages.

On November 10 the order now appealed from was made.

The defendant's affidavit contained the following statements: "Although the agreement between us is silent as to the parts which I was to play (being a printed form) the plaintiff promised me, and it was distinctly understood between us, that a certain line of parts of the same importance as I had previously been accustomed to play under several well-known London managers should be allotted to me on my joining his company. . . . From the commencement of the rehearsals I found that the plaintiff

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was not carrying out his promises in letting me play the parts arranged." One of the parts referred to was the part of "Sir George Orreyd" in "The Second Mrs. Tanqueray." A further affidavit used on behalf of the plaintiff contained the following statement: "Although the defendant at the time he left New York was not in the cast of the play then being performed by the plaintiff and his company, namely, 'The Second Mrs. Tanqueray,' he was an understudy of one of the parts in such play, and as such he had to attend the theatre nightly in order to ascertain whether the actor whose part he understudied was able to play that evening, and at the time he threw up his engagement it was necessary for the proper carrying out of the plaintiff's business that the defendant should present himself at the theatre each evening, it being uncertain whether his services would be required or not."

Kisch, for the defendant, in support of the appeal. This is not a case for an injunction. It appears from the affidavits that the defendant's engagement was entered into in consideration of the plaintiff's undertaking to provide certain parts in particular plays for him. This undertaking has not been carried out, and the consideration has therefore failed. The contract is at an end, and the defendant has ceased to be a member of the plaintiff's company, and therefore is not liable to an injunction. In cases of this nature, where one party has failed to perform his part of the undertaking, an injunction cannot be granted against the other party to restrain him from a breach of his part: *Fechter* v. *Montgomery*. (1) This is not such a negative stipulation as can be enforced by injunction. The undertaking is in restraint of trade, and therefore contrary to public policy, and invalid. It is not a case where specific performance could possibly be granted, and therefore is not a case for an injunction.

[WRIGHT, J., referred to *Donnell* v. *Bennett*. (2)]

In any case the granting of an injunction is discretionary: *Lumley* v. *Wagner* (3), per Lord St. Leonards, L.C. (4) Here the discretion ought not to be exercised in favour of the plaintiff.

(1) 33 Beav. 22.
(2) 22 Ch. D. 835.
(3) 5 De G. & Sm. 485; 1 De G. M. & G. 604.
(4) 1 De G. M. & G. at pp. 632, 633.

The doctrine of *Lumley* v. *Wagner* (1) ought not to be extended; *Whitwood Chemical Company* v. *Hardman* (2), where Lindley, L.J., said: "I confess I look upon *Lumley* v. *Wagner* (1) rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend." (3)

[He also referred to *Hitchcock* v. *Coker* (4); *Webster* v. *Dillon* (5); *Montague* v. *Flockton* (6); *Doherty* v. *Allman* (7); *Johnstone* v. *Milling* (8); *Maxim Nordenfelt Guns and Ammunition Company* v. *Nordenfelt.* (9)]

Lockwood, Q.C., and *W. Graham*, for the plaintiff. There is nothing contrary to public policy in such a stipulation as that contained in No. 3 of the rules and regulations. *Lumley* v. *Wagner* (1) is conclusive against the defendant on that point. The stipulation here is expressly framed in negative language.

[WILLS, J., referred to *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Ry. Co.* (10)]

There has been nothing which has the effect of putting an end to the contract. In fact, the defendant's own letter of October 16, asking the plaintiff to cancel his engagement, which request was not assented to, is conclusive against any such suggestion. The defendant, by referring in his affidavit to alleged conversations, is seeking to vary a written contract by verbal statements, which is contrary to the rules of evidence, and there is nothing in the decision in *Fechter* v. *Montgomery* (11) to shew that any such conversation can be imported. There is no evidence to shew any undertaking on the part of the plaintiff such as the defendant now alleges, and there is nothing to shew that the plaintiff has not carried out his part of the agreement.

Kisch, replied.

WILLS, J. This case is not by any means free from difficulty; but after carefully considering the argument which has been

(1) 5 De G. & Sm. 485; 1 De G. M. & G. 604.
(2) [1891] 2 Ch. 416.
(3) [1891] 2 Ch. at p. 428.
(4) 6 A. & E. 438.
(5) 3 Jur. (N.S.) 432.
(6) Law Rep. 16 Eq. 189.
(7) 3 App. Cas. 709.
(8) 16 Q. B. D. 460.
(9) [1893] 1 Ch. 630.
(10) 1 H. & M. 468; 32 L. J. (Ch.) 677.
(11) 33 Beav. 22.

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addressed to us, I have come to the conclusion that the order of Bruce, J., is right. It is contended on behalf of the defendant that the agreement is one which ought not to be enforced by injunction, on the ground that it does not contain a negative stipulation. The words are, "No member of the company is allowed to act, sing, or appear publicly at any other theatre, without special permission of the management. A breach of this article incurs a forfeiture of engagement and renders the member liable to immediate dismissal." In my opinion that stipulation is as distinctly negative as anything can possibly be. This is an agreement of a kind which is pre-eminently subject to the interference of the Court by injunction, for in cases of this nature it very often happens that the injury suffered in consequence of the breach of the agreement would be out of all proportion to any pecuniary damages which could be proved or assessed by a jury. This circumstance affords a strong reason in favour of exercising the discretion of the Court by granting an injunction.

Then it is said that the defendant had ceased to be a member of the plaintiff's company. I do not think so. This could only be the case if the contract were rescinded, or if there were such conduct on the part of the plaintiff as to justify the defendant in treating it as if it were rescinded. It is stated in the defendant's affidavit that the plaintiff promised that he should play the part of "Sir George Orreyd" in "The Second Mrs. Tanqueray." The defendant writes the letter of October 16, but he does not say there what he now says. I am of opinion that what is alleged to have passed in conversation is no part of the contract. It might be taken into consideration if it indicated a want of good faith on the part of the plaintiff; but that is out of the question, on the facts which appear from the affidavits. It is clear that the allotting of particular parts to the defendant was not intended to be part of the consideration of the contract. It is certainly true, as has been argued, that the Court will decline to interfere by injunction where the plaintiff fails to do that which he has promised to do as part of the contract. An instance of this is afforded by the case of *Fechter* v. *Montgomery* (1), which was referred to in argument. In that case

(1) 33 Beav. 22.

the defendant was engaged to act at the Lyceum Theatre for a period of two years, and the agreement was construed by the Court to mean on the one side that the defendant should have an opportunity of displaying what his abilities and talents were before a London audience, and on the other side that he would not act elsewhere without the permission of the plaintiff. Five months after the agreement had been entered into no part had been allotted to the defendant, and for this reason the Master of the Rolls came to the conclusion that the plaintiff's own engagement had been broken, and therefore he could not enforce the negative stipulation on the part of the defendant. In the present case, what is the obligation on the part of the plaintiff contained in the contract? The plaintiff engages the defendant to act and understudy; but that does not mean that he undertakes to provide a part for him in every play that may be produced. That was not the ground on which the decision in *Fechter* v. *Montgomery* (1) proceeded. In that case the plaintiff was bound to give the defendant a reasonable opportunity of acting, and failed to do so. But a manager cannot be expected to give every actor whom he engages a part in every play which may be produced, and generally to attempt to do so would not be for the benefit of the actor. All that the defendant can be entitled to is to have a reasonable opportunity of acting and understudying, having regard to all the circumstances of the case. On October 16, only seven days after "The Second Mrs. Tanqueray" was first produced in America, the defendant writes a letter assuming that this particular play is to go on for the whole of the time during which the plaintiff's company is to remain in that country. But such a statement cannot afford any evidence against the plaintiff, unless he acquiesced in it. The defendant does not say that the plaintiff acquiesced, and on the other hand the plaintiff puts in a very straightforward affidavit, which explains the true state of the facts. Moreover the defendant's own letter and affidavit shew that at least two other pieces were contemplated as likely to be produced by the company. It comes to this, that after the lapse of a week the defendant chose to assume, probably

(1) 33 Beav. 22.

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erroneously, that the whole of the rest of the tour would be lost to him, so far as the opportunity of appearing in any parts was concerned. For the reasons which I have stated I am of opinion that the order of Bruce, J., granting an injunction is right, and ought to be affirmed.

WRIGHT, J. I am of the same opinion. The contract contains a negative stipulation, which the plaintiff seeks to enforce by injunction. Until the decision in *Donnell* v. *Bennett* (1), the doctrine in accordance with which such stipulations were enforced by injunction was seriously interfered with by the supposed rule that, where there could be no decree for specific performance of a contract on the one side, there ought to be no injunction on the other side; but since the decision in *Donnell* v. *Bennett* (1) this view has been somewhat altered. In the present case what equity is there against the plaintiff? No specific promise is shewn to give the defendant the part of "Sir George Orreyd" in "The Second Mrs. Tanqueray," as the defendant now seeks to make out. The defendant's affidavit is studiously vague as to that point. I agree that the order for an injunction ought to be upheld.

Appeal dismissed.

Solicitors for plaintiff: *Long & Gardiner.*
Solicitors for defendant: *Harwood & Stephenson.*

(1) 22 Ch. D. 835.

P. B. H.

[IN THE COURT OF APPEAL.]

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Oct. 26, 28, 30;
Nov. 28.

SOUTH HETTON COAL COMPANY, LIMITED *v.* NORTH-EASTERN NEWS ASSOCIATION, LIMITED.

Defamation—Libel—Action for, by Joint Stock Company—Corporation—Statement affecting Business Reputation of Trading Corporation—Special Damage, Absence of.

An action of libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business, without proof of special damage.

The sanitary condition of a large number of cottages let by the proprietors of a colliery to their workmen is a matter of public interest, fair comment on which is not libellous.

APPLICATION by defendants for judgment or a new trial.

The plaintiffs, a company registered under the Companies Acts, which owned collieries at South Hetton, in the county of Durham, with a number of cottages in connection therewith, forming the bulk of the village, sued the defendants, who were the proprietors of a newspaper called the *North-Eastern Gazette*, for a libel published in their newspaper. The alleged libel was an article in the defendants' newspaper, which appeared to be one of a series descriptive of colliery villages in the county. It was headed "The Homes of the Pitmen," "South Hetton," "By our Special Correspondent." It stated at the commencement that the South Hetton colliery belonged to the plaintiffs' company, and then proceeded to give a lengthy and detailed description of the condition of the various streets in the village of South Hetton and of the houses therein, the general effect being to describe the village as in a highly insanitary state, and the houses as, for the most part, being unfit for habitation, from absence of proper and decent conveniences, inadequate accommodation for the occupants, and want of sufficient water supply. (1) The statement of claim alleged that by the libel the defendants intended that the plaintiffs' property was insanitary and unhealthy and unfit for habitation, and that the

(1) The article was very long, and it is not thought necessary for the purpose of illustrating the point of law which arose to do more than to summarize it as above.

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plaintiffs' company was guilty of neglect of its workmen, and failed in a manner, which was unjustifiable and discreditable, to provide for such workmen fit and proper houses, with fit and proper sanitary conveniences, and that the plaintiffs' company was not such a master as workmen could or should serve, and that by reason of the premises the plaintiffs' company had been injured in its credit and reputation, and had suffered damage. No special damage was alleged.

At the trial before Lord Coleridge, C.J., at Newcastle, it appeared that the plaintiffs were either owners or tenants of the bulk of the houses in the village described in the article, which were occupied by the colliers employed by them as part of their wages. It appeared that the population of the village was over 2000. A great deal of evidence was given on both sides, which was in many respects more or less conflicting, with regard to the accuracy or otherwise of the details of the description given by the article. (1)

No actual damage was proved by the plaintiffs.

The Lord Chief Justice ruled that the matter discussed in the article was a matter of public interest, and in substance left it to the jury to say whether the article went beyond the limits of fair and bonâ fide comment. The jury found a verdict for the plaintiffs for 25*l.* damages.

Oct. 26, 28, 30. *Robson, Q.C.*, and *Scott Fox*, for the defendants. A joint stock company cannot bring an action in respect of a statement concerning it unless the statement relates to its business and actual pecuniary damage is proved. It has no feelings which may be hurt or irritated; and it has no moral character which can be defamed. An action for libel or slander in the proper sense of the term will not lie by a corporation or company, because such an action is for defamation of character, and a corporation or company has no personal character. The

(1) The question whether, having regard to the evidence so given, the description was substantially fair and accurate, or was so exaggerated and unfair as to go beyond the limits of fair comment, was argued at length in the Court of Appeal; but, it being a mere question of fact, it is not thought necessary to state the details of the evidence or to set out the arguments on that point.

only action of this nature that will lie at the suit of a corporation is really an action on the case for malicious statements with regard to its property or business, which have occasioned actual damage to it, in the nature of an action for slander of title; and the damage is the gist of the action: *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1); *Mayor, &c., of Manchester* v. *Williams* (2); *Ratcliffe* v. *Evans.* (3) In this case no special damage was proved.

Secondly, the article complained of cannot be said to relate to the plaintiffs' business. Nor is it calculated to injure their business. The effect of the article may be, if the statements are true, to impute inhumanity in the treatment of employés, but of that the company as a corporate entity cannot be guilty. Such an imputation is not likely to affect the sale of the company's coal or its profits.

Thirdly, the matter to which the article related was matter of public interest, having regard to the size of the area and the amount of the population involved, the effect of the state of things described upon the sanitation of the district, and its bearing upon the mode in which the sanitary authority of the district performed their duties. Therefore it might be made the subject of fair comment. It is contended that having regard to what was proved at the trial there was substantially no evidence entitling the jury to find that this article went beyond the limits of fair comment.

Waddy, Q.C., and *Lawson Walton, Q.C.* (*T. Willes Chitty*, with them), for the plaintiffs. It is true that in some respects a corporation is not capable of defamation, but it is capable of being defamed in respect of its business character. It is well settled that an action of libel will lie at the suit of a partnership for defamatory statements calculated to injure it in the way of its trade or business: see Lindley on Partnership, 6th ed., p. 288; Story on Partnership, ss. 256, 257; Odgers' Libel and Slander, 2nd ed., pp. 415, 416; and there is no difference in principle in this respect between an unincorporated firm and a trade corporation. This libel was calculated seriously to injure the plaintiffs in the way of their business by preventing

(1) 4 H. & N. 87. (2) [1891] 1 Q. B. 94.
(3) [1892] 2 Q. B. 524.

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men from entering into their employment. In *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1) Pollock, C.B., gives the reason why in some cases an action of libel will not lie at the suit of a company, viz., that they are not capable of being guilty of certain matters such as murder or adultery; but he held that in other cases such an action would lie. It is true that he used words which may seem to limit the right of a company to sue for libel to cases where their property is injured; but it is submitted that, so far, what he said was merely obiter, and by way of illustration. In that case there was really nothing that amounted to an allegation of special damage. In none of the cases in which partners have sued for defamation has it been held that special damage must be shewn in order to support the action. The onus is on the defendant to shew that the right to recover is limited to cases in which special damage is alleged and proved. In *Russell* v. *Webster* (2) it was held that co-proprietors of a newspaper might maintain an action for a libel upon them in their business without proving special damage. In *Williams* v. *Beaumont* (3) the action was for a libel on a partnership, and it was not suggested that special damage had been shewn. In *Le Fanu* v. *Malcolmson* (4) the libel was a complaint of the way in which the plaintiffs treated people employed in their factory. The action was brought by the partners jointly, and no special damage was alleged or proved.

In 2 Wms. Saund., 5th ed., p. 117a, ed. 1871, p. 383, there is a general statement of the law on the subject of actions by partners for libel or slander in the notes to *Coryton* v. *Lithebye*, which concludes as follows: "Though there was special damage laid in the declaration in this case, yet if words are actionable only because they were spoken of persons in the way of their trade, I conceive that two or more partners may join in an action for the words, though they had sustained no special damage thereby." In *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1) Watson, B., pointed out that there is no distinction for this purpose between partnerships and incorporated companies and joint stock companies.

(1) 4 H. & N. 87.
(2) 23 W. R. 59.
(3) 10 Bing. 260.
(4) 1 H. L. C. 637.

If the conclusion be once arrived at that an action of defamation will lie in respect of statements with regard to the business character of a corporation, then it follows that there is no need to prove special damage; for in the case of libel general damages can always be given; and in the case of slander, either of a person or a partnership, in the way of trade or business, it is unnecessary to shew special damage: and, therefore, it cannot be necessary to shew it in the case of a libel on a company in the way of their business.

The libel here complained of was an attack on the business reputation of the company. The article did not relate to a matter of public interest. There was evidence to support the finding of the jury that it went beyond the limits of fair comment.

[They cited *Thomas* v. *Williams* (1); *Thorley's Cattle Food Co.* v. *Massam* (2); *Prudential Assurance Co.* v. *Knott* (3); *Mayor, &c., of Manchester* v. *Williams* (4); *Ratcliffe* v. *Evans* (5); *Hill* v. *Hart Davis* (6); *Liverpool Household Stores Association* v. *Smith* (7); *Bonnard* v. *Perryman* (8); *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre.* (9)]

Robson, Q.C., in reply. The law implies damage, no doubt, in the case of defamation of character by libel. But a corporation has no character in the sense necessary to an action of libel. Moreover, this article made no statements in relation to the business of the company. It made statements with regard to certain cottages belonging to them. Such a statement is, in the nature, not of defamation of character, but of slander of title, and is not actionable without special damage.

Cur. adv. vult.

Nov. 28. LORD ESHER, M.R. In this case an action is brought by an incorporated colliery company against the proprietors of a newspaper for a libel contained in an account by a correspondent of the newspaper of the state of things in a certain district. The case was tried before the Lord Chief Justice and a jury at

(1) 14 Ch. D. 864.
(2) 14 Ch. D. 763.
(3) Law Rep. 10 Ch. 142.
(4) [1891] 1 Q. B. 94.
(5) [1892] 2 Q. B. 524.
(6) 21 Ch. D. 798.
(7) 37 Ch. D. 170.
(8) [1891] 2 Ch. 269.
(9) 11 Q. B. D. 674.

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Newcastle, when the jury found that the article complained of was a libel. The Lord Chief Justice held that the article related to matter of public interest; but the jury seem to have thought that the description given in it was so far exaggerated as not to be a fair description; and, consequently, they found for the plaintiffs, and the Lord Chief Justice entered judgment accordingly. I have considered the case, and I have come to the conclusion that the law of libel is one and the same as to all plaintiffs; and that, in every action of libel, whether the statement complained of is, or is not, a libel, depends on the same question—viz., whether the jury are of opinion that what has been published with regard to the plaintiff would tend in the minds of people of ordinary sense to bring the plaintiff into contempt, hatred, or ridicule, or to injure his character. The question is really the same by whomsoever the action is brought—whether by a person, a firm, or a company. But though the law is the same, the application of it is, no doubt, different with regard to different kinds of plaintiffs. There are statements which, with regard to some plaintiffs, would undoubtedly constitute a libel, but which, if published of another kind of plaintiffs, would not have the same effect. For instance, it might be stated of a person that his manners were contrary to all sense of decency or comity, and such that, if the statement were true, they would render him deserving in the minds of persons of ordinary sense of contempt, hatred, or ridicule; but, if the same thing were said with regard to a firm, or company, it would be impossible that it should have the same effect, because a firm or company as such cannot have indecent or vulgar manners. Therefore, although the law is the same with regard to libel on a firm or company as with regard to libel on a person, the conditions under which the particular statement can be libellous may not exist with regard to them. There are other statements which would have the same effect, whether they were made with regard to a person, or a firm, or a company; as, for instance, statements with regard to conduct of business. It may be published of a man in business that he conducts his business in a manner which shews him to be a foolish or incapable man of business. That would be a libel on him in the way of his business, as it is called—that is to say, with regard to his conduct of

his business. If what is stated relates to the goods in which he deals, the jury would have to consider whether the statement is such as to import a statement as to his conduct in business. Suppose the plaintiff was a merchant who dealt in wine, and it was stated that wine which he had for sale of a particular vintage was not good wine; that might be so stated as only to import that the wine of the particular year was not good in whosesoever hands it was, but not to imply any reflection on his conduct of his business. In that case the statement would be with regard to his goods only, and there would be no libel, although such a statement, if it were false and were made maliciously, with intention to injure him, and it did injure him, might be made the subject of an action on the case. On the other hand, if the statement were so made as to import that his judgment in the selection of wine was bad, it might import a reflection on his conduct of his business, and shew that he was an inefficient man of business. If so, it would be a libel. In such a case a jury would have to say which sense the libel really bore; if they thought it related to the goods only, they ought to find that it was not a libel; but, if they thought that it related to the man's conduct of business, they ought to find that it was a libel. With regard to a firm or a company, it is impossible to lay down an exhaustive rule as to what would be a libel on them. But the same rule is applicable to a statement made with regard to them. Statements may be made with regard to their mode of carrying on business, such as to lead people of ordinary sense to the opinion that they conduct their business badly and inefficiently. If so, the law will be the same in their case as in that of an individual, and the statement will be libellous. Then, if the case be one of libel—whether on a person, a firm, or a company—the law is that the damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case.

In the present case, assuming that the article complained of had not related to a matter of public interest, the only question would have been whether it contained statements with regard to the conduct by the plaintiffs' company of their business, tending

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to shew that it was so improper and inefficient as to bring them into contempt or discredit. If the jury found that it did, the plaintiffs would be entitled to damages at large, without giving any evidence of particular damage. If this had not been a matter of public interest, I think that the article was such as would entitle the jury to find that it was a libel on the plaintiffs' company.

Then comes the second question, viz., whether this article related to a matter of public interest. The Lord Chief Justice thought that it did. I agree with him. I think that it related to so large a number of people, of such a kind, to a district of such an extent, and to matters of such importance as to render it a matter of public interest that the conduct of the employers should be criticised.

If a person undertakes to make such a criticism in respect of a matter of public interest, he must do so with due moderation; and, if he can be shewn to have made use of unfair exaggerations, then his criticism will go beyond the limits of fair comment on a matter of public interest, and will therefore be libellous. If the comment is a fair one, and within reasonable limits, and relates to a matter of public interest, it will not be a libel at all, although it would be one if it did not relate to a matter of public interest; and in that case the verdict should be for the defendants on the question of libel or no libel.

That raises the only remaining question, viz., whether there was in the description contained in this article sufficient exaggeration to entitle the jury to say that it went beyond a fair description in relation to a matter of public interest. I am not prepared to say that, if I had been on the jury, I might not have found that this article was within the limits of fair description. I might have been inclined to think that, though severe, it was not unfair; but I cannot say, looking at it, that it did not contain statements which entitled the jury to come to a different conclusion, and to say that it was so florid a description as to go beyond the limits of fair comment. For these reasons I do not think that we can set aside the verdict of the jury or the judgment of the Lord Chief Justice based upon it. Therefore the application must be dismissed.

LOPES, L.J. The libel complained of attacks the plaintiffs in respect of their management of their property as colliery proprietors. The defence is that it is a fair and bonâ fide comment on a matter of public interest. No action will lie if the defendant can prove that the words complained of are a fair and bonâ fide comment on a matter of public interest. The Court decides whether the matter commented on is one of public interest; the jury, if the Court is of opinion that there is some evidence that the comment is unfair, finds whether it is so or not.

I do not propose to go into the facts of the case at length, but shall state my view of the law on the questions raised.

It is not contended that the words complained of are not primâ facie defamatory.

Three questions are raised: (1.) Will the action lie by the plaintiffs, who are a corporation? (2.) Is the matter commented on one of public interest? (3.) Is the comment complained of fair and bonâ fide?

With regard to the first point I am of opinion that, although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage. The words complained of, in order to entitle a corporation or company to sue for libel or slander, must injuriously affect the corporation or company as distinct from the individuals who compose it. A corporation or company could not sue in respect of a charge of murder, or incest, or adultery, because it could not commit these crimes. Nor could it sue in respect of a charge of corruption or of an assault, because a corporation cannot be guilty of corruption or of an assault, although the individuals composing it may be. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position. Can it be contended that, if words are written attributing to a banking company insolvency, that an action will not lie, and that without alleging or proving special damage?

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The limits of a corporation's rights are those suggested by Pollock, C.B., in *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1859) (1), where he says, "That a corporation at common law can sue in respect of a libel, there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, although the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong; and, if its property is injured by slander, it has no means of redress except by action. Therefore, it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured." Again, in *Mayor, &c., of Manchester* v. *Williams* (2), this matter was dealt with by Day, J. In that case an action of libel was brought by a corporation, in which the statement of claim alleged that the defendant had charged the plaintiffs with corrupt practices. There was no allegation that the plaintiffs had suffered any special pecuniary damage in consequence of such imputation. It was held that, inasmuch as a corporation, as distinguished from the individuals composing it, cannot be guilty of corrupt practices, the statement of claim disclosed no cause of action. The learned judge said, in giving judgment, "The question is whether such an action will lie. I think it will not. It is altogether unprecedented, and there is no principle on which it could be founded. The limits of a corporation's right of action for libel are those suggested by Pollock, C.B., in the case which has been referred to. A corporation may sue for a libel affecting property, not for one merely affecting personal reputation." Again, in Story on Partnership, s. 257, it is stated that, "on the other hand, there is not the slightest doubt that a joint action may be maintained by the firm for any defamation of the firm, or for any libel upon the firm; for this is, justly and properly speaking, a joint tort and injury, applicable to their collective rights and interests. But in such a case the damages must be strictly

(1) 4 H. & N. 87, at p. 90. (2) [1891] 1 Q. B. 94, at p. 96.

limited to the injury sustained by the firm in their joint trade or business, and cannot be extended to the injury done to the private feelings of the individual partners."

In a case of slandering a man in respect of his office, profession, or trade it is not necessary to allege or prove special damage; nor is it necessary in the case of libelling a corporation or company in respect of their trade or business. In my judgment this action by the plaintiffs will lie.

But is the matter commented on one of public interest? This is a question for the Court. The attack upon the plaintiffs is in respect of the sanitary condition of their property, involving the health, comfort, and well-being of over two thousand human beings. The sanitary condition of this large population is placed under the control of a public body who do not interpose. Can it be said that this alleged state of things is not a matter of grave public interest? It may be that there is no case in the books holding a matter like this one of public interest; but I am clearly of opinion that a matter like this now before the Court may be made the subject of hostile criticism and of hostile animadversion, provided the language of the writer is kept within the limits of an honest intention to discharge a public duty. I agree with the Lord Chief Justice in holding this a matter of public interest.

But is the comment fair and bonâ fide? This is essentially a question for the jury, provided there is any evidence upon which they may so find. This defence raises no question of privilege. The defence in such a case is that the words are not defamatory, that fair and proper comment is no libel.

It is only as was said by Bowen, L.J., in *Merivale* v. *Carson* (1887) (1), when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all. It is for the jury to consider what impression would be produced in the mind of an unprejudiced reader who reads the report straight through, knowing nothing about the case beforehand. They must not dwell too much on isolated passages, they must consider the report as a whole. If there are such deviations from absolute accuracy as to make the comment unfair, they

(1) 20 Q. B. D. 275, at p. 283.

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must find for the plaintiff; but, if there are no such deviations, or the deviation is minute and within the latitude of fair discussion, and within the region of that diversity of opinion which may be fairly and reasonably entertained by different persons upon the same subject-matter, they should find for the defendant.

Applying these rules to this case, I have come to the conclusion that the jury was justified in finding for the plaintiffs. Whether I should have found the same verdict is not the question. If there was evidence upon which the jury might reasonably find as they did, the verdict cannot be disturbed.

The appeal must be dismissed.

KAY, L.J. This appeal raises questions of great importance and interest.

The action is by a joint stock company, incorporated, carrying on a colliery business, against the proprietors and publishers of a newspaper, for a libel published in that paper. The alleged libel describes the condition of a village, in which the miners and their families, to the number of about 2000, are living; and it describes it as being unfit for habitation according to rules of health or morality. We are told that the miners are allowed to occupy the houses in the village rent free, and receive less money wages in consequence. The article goes into considerable detail as to the sanitary arrangements, water supply, overcrowding of the houses, and the like.

The first question is whether the subject of this article is a matter of public interest, upon which it is lawful to make fair criticism or comment.

Considering the extent of colliery business in this country, the enormous number of men employed in it, the legislative provisions that have of necessity been made concerning the mode of carrying it on, as for instance in the ventilation of coal mines, considering the number of people in this particular village, the fact that the houses in which they live are supplied by the colliery proprietors rent free as part of the colliers' wages, that this very village is within the jurisdiction of a rural sanitary authority, and that the article complained of seems from the commencement of it to be one of a series dealing with the homes

of pitmen in the county of Durham, I am of opinion that the subject of the article is a matter of public interest, and that a fair criticism upon such a subject would not be a libel at all: see per Lord Blackburn in *Campbell* v. *Spottiswoode* (1), and per Lord Bowen in *Merivale* v. *Carson*. (2)

Whether upon the whole the article is fair criticism or comment is eminently a matter for a jury to decide.

The next and most important question is whether this action will lie without allegation or proof of special damage.

One of the differences between libel and slander is that, in an action for libel, i.e., where the defamatory statement is printed or written and published, and not merely communicated orally, generally speaking damage is presumed, and that which is called special damage, viz., the suffering some definite loss, need not be proved or alleged. But where the plaintiffs are two or more persons associated in partnership, the only libel of which they can jointly complain is one which may injure their joint property or their joint trade or business. The same law is applicable to a certain extent to a trading corporation. Its property or its business may be injured by defamatory statements whether written or oral. It has a trading character, the defamation of which may ruin it. If, for example, an individual, a private partnership, or a corporation were carrying on a trading business, and some one wrote and published an untrue statement that they were insolvent, or any other statement which might destroy their credit or paralyze their business, it is obvious that such a statement, if untrue, would be a libel.

Now, for a libel calculated to injure the business of a trading concern, is it the law that no action will lie, unless special damage is alleged and proved? The general rule is that, in an action for libel upon an individual, no proof of special damage is necessary. If such proof were necessary in order to lay a foundation for the action, it is obvious that in many cases the plaintiff would be put in a position of much difficulty.

But there is considerable authority upon this question. In the first place, if a slander be spoken calculated to injure an

(1) 32 L. J. (Q.B.) 185, at p. 202; 3 B. & S. 769.
(2) 20 Q. B. D. 275, at p. 283.

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individual in his trade, it is not necessary to allege or prove special damage to found the action, that being an exception to the general rule that in actions of slander special damage must be alleged and proved: *Phillips* v. *Jansen* (1); *Ingram* v. *Lawson* (2); *Hayward* v. *Hayward*. (3) It would be strange if, that being so in an action for slander, it should still be necessary to allege and prove special damage in an action not for slander, but for libel of a person in respect of his trade. The presumption of damage in the case of libel is much stronger.

In *Le Fanu* v. *Malcolmson* (1848) (4), the libel was upon the defendants as owners of factories, imputing that cruelties were practised in their treatment of the persons employed in them. There was no allegation of special damage; but the plaintiffs, it was held, could maintain a joint action, and were entitled to recover substantial damages. In *Ingram* v. *Lawson* (1840) (2), the action was brought three days after the publication of the libel, which was held to be "a libel on the plaintiff in his business of a master mariner and shipowner." There was no allegation of special damage. It was held that the plaintiff "was not bound to wait until actual damage had been incurred. The jury were warranted in giving such damages as they thought fit for the publication of the libel and the injury to his character in the way of his business." The verdict was for 900*l.*, some evidence of general damage having been given. In *Russell* v. *Webster* (1874) (5), Bramwell, B., and Pigott, B., held, that a libel published of the plaintiffs as co-proprietors of a newspaper, being of a defamatory character and published of them in relation to their business, might be made "the subject of a joint action without any proof of special damage," and that the jury might give general damages, that is, damages according to their discretion under all the circumstances of the case.

Then it is suggested that, although an individual can sue for a libel upon him in relation to his business, or even the members of a partnership may maintain a joint action for such a libel, yet that an incorporated company cannot. But why not? Such a

(1) 2 Esp. 624.
(2) 6 Bing. N. C. 212.
(3) 34 Ch. D. 198.
(4) 1 H. L. C. 637.
(5) 23 W. R. 59.

corporation has a trading character, which may be destroyed by libel. If an individual or the members of a firm may sue for a libel imputing to them insolvency, because of the damage which such a libel is calculated to do them in relation to their business, could it possibly be maintained that a trading corporation could not sue for a like libel?

Again, the authorities seem to shew that such a corporation can sue for such a libel, just as an individual might.

In *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1859) (1), Pollock, C.B., says, "That a corporation at common law can sue in respect of a libel, there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title, through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes; nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, though the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong: and, if its property is injured by slander, it has no means of redress except by action. Therefore it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured;" and he held that a trading corporation formed under 19 & 20 Vict. c. 47, had the same power, saying this: "In order to carry on business it is necessary that the reputation of such a corporation should be protected, and therefore in cases of libel or slander it must have a remedy by action;" and the other judges of the Court of Exchequer concurred.

It had previously been held in *Williams* v. *Beaumont* (1833) (2), that a trading association not incorporated entitled by Act of Parliament to sue or be sued in the name of its chairman might sue in his name for a libel on the association in the way of its business. In *Thorley's Cattle Food Co.* v. *Massam* (1880) (3), the plaintiffs were a company incorporated under the Act of 1862, and had brought the action for a libel. Bramwell, L.J., said, at p. 784: "I am satisfied that this was a libel on the plaintiffs in

(1) 4 H. & N. 87.
(2) 10 Bing. 260.
(3) 14 Ch. D. 763.

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the way of their trade, and calculated to do them injury, and consequently an action is maintainable."

I therefore am of opinion that a trading corporation may sue for a libel calculated to injure them in respect of their business, and may do so without any proof of damage general or special. Of course if there be no such evidence the damages given will probably be small.

With respect to the article now in question, it is suggested that it does not impute anything to the corporate company. I cannot agree in this. It states in the commencement that they are the owners of the colliery, and throughout the meaning of the writer seems to me to be to throw great blame upon them for the manner in which the colliers are housed in this village.

Then, is the article fair? Does it come within the rule which allows fair criticism and comment upon a matter of public interest? Not much fault has been found with that part of it which consists of comment or criticism properly so-called. It is the accuracy of the statements of fact which is called in question. According to the evidence many of the houses in this village are little better than hovels—low buildings consisting of one room on the ground floor and an unceiled garret under a slate roof above. Others scarcely any larger have the ground floor divided into two small rooms. Many of these houses have no privies at all. Very many have none provided by the company, but the occupiers have provided some in their plots of garden, which are not immediately attached to the houses. From the other houses all the refuse is taken in boxes and thrown into open pits in the streets from which the company's carts carry it away. The water supply consists of water pumped from the pits into large iron tanks from whence it is conducted to taps here and there in the streets. There is no restriction upon the occupiers taking lodgers, and this is done to a great extent. No one who has attended to the evils which result from overcrowding of houses and want of decent sanitary accommodation can resist the conviction that this state of things deserves severe comment. I am not able to say that there are not in this article misstatements and exaggerations which were evidence for the jury of unfairness; but the state of things admitted to exist is so serious

that I should not have been inclined to interfere if the verdict had been for the defendants. However, as I began by saying, the question whether the article is fair is eminently a question for the jury. It seems to me impossible to hold that there was not some evidence of unfairness, and therefore I think that we cannot, according to the rules which we observe on motions for new trials, interfere with the verdict in this case.

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Application refused.

Solicitors for plaintiffs: *Crossman & Prichard, for Dees & Thompson, Newcastle.*

Solicitors for defendants: *Jackson & Jackson.*

E. L.

[IN THE COURT OF APPEAL.]

Followed. KAHAN *v.* PAKISTAN FEDERATION [1951] 2 K. B. 1003

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MIGHELL *v.* SULTAN OF JOHORE.

International Law—Foreign Sovereign, Immunity of—Extraterritoriality—Jurisdiction—Submission to Jurisdiction—Proof of Status of Sovereign—Certificate of Secretary of State.

The Courts of this country have no jurisdiction over an independent foreign sovereign, unless he submits to the jurisdiction. Such submission cannot take place until the jurisdiction is invoked.

Therefore, the fact that a foreign sovereign has been residing in this country, and has entered into a contract here, under an assumed name, as if a private individual, does not amount to a submission to the jurisdiction, or render him liable to be sued for breach of such contract.

A certificate from the Foreign or Colonial Office, as the case may be, is conclusive as to the status of such a sovereign.

MOTION to set aside an order for substituted service of a writ of summons in an action for breach of promise of marriage, and to stay all proceedings therein, on the ground that the Court had no jurisdiction over the defendant, who was described in the writ as "The Sultan of the State and Territory of Johore, otherwise known as ~~Albert~~ Abu Baker."

The order for substituted service was obtained ex parte from a master in chambers on August 30, 1893. The motion to set aside that order having come before Wright, J., sitting as

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vacation judge, on September 7, 1893, the learned judge adjourned the hearing of the motion, and caused a communication to be made to the Secretary of State for the Colonies, in order to ascertain the status of the defendant. In answer to that communication a letter was written to Wright, J., by an official at the Colonial Office, purporting to be written by direction of the Secretary of State for the Colonies, and informing him that Johore was an independent state and territory in the Malay Peninsula, and that the defendant was the present sovereign ruler thereof; that the relations between the Sultan and Her Majesty the Queen, which were relations of alliance and not of suzerainty and dependence, were regulated by a treaty made on December 11, 1885, of which a copy was enclosed; that the Sultan had raised and maintains armed forces by sea and land, had organised a postal system, dispenses justice through regularly constituted courts, had founded orders of knighthood, confers titles of honour; and, generally speaking, exercised without question the usual attributes of a sovereign ruler. By the treaty it was agreed that the Governor of the Straits Settlements should protect the Sultan's territory from external hostile attack, and for that purpose Her Majesty's officers were to have access at all times to the waters of the State of Johore; and by art. 6 of the treaty the Sultan bound himself not to negotiate treaties or to enter into any engagement with any foreign state.

The motion was referred by Wright, J., to the Divisional Court, who were furnished with the letter from the Colonial Office. An affidavit made by the plaintiff, and used on the hearing of the motion, contained the following material statements: The plaintiff was introduced to the defendant in August, 1885, as "Mr. Baker," and she had known him by the name of "Albert Baker," under which name he passed and was generally known, ever since. The defendant promised her marriage in 1885. About September, 1885, he took a furnished house at Goring in the name of Albert Baker, and was known by that name, and no other, in the district and neighbourhood. He always represented himself as a private individual and an ordinary subject of the Queen, and was always treated as such. In October, 1885, the plaintiff accidentally discovered that the defendant was the

Sultan of Johore, and thereupon he made her promise never to reveal who he was, nor to call him by any other name than that of Albert Baker, saying that he wished to conceal his real position, and to preserve his incognito. He remained in this country, living at various places, for some time, and always represented himself, and was treated by servants, tradesmen, and others, as a private individual and a subject of the Queen, and always passed under the name of Albert Baker. He returned to this country, after several years absence, in 1891, and again passed, represented himself, and was treated as "Mr. Baker," and as a private individual and subject of the Queen, living incognito as before in a private house in the Isle of Wight.

Finlay, Q.C. (*George Wallace* with him), for the defendant, in support of the motion. The order for substituted service ought to be set aside, and all proceedings in the action stayed. The letter from the Colonial Office to Wright, J., establishes conclusively that the Sultan of Johore is an independent sovereign ruler. It is clear, therefore, according to well-known principles of international law, which are stated by the Court of Appeal in *The Parlement Belge* (1), that he cannot be sued in the Courts of this country. The Sultan has not answered the plaintiff's affidavit, because he objects to the jurisdiction of this Court. [He was stopped.]

George White, for the plaintiff. First, the letter from the Colonial Office is not conclusive to shew that the Sultan of Johore is an independent ruling sovereign. It must be read with the treaty to which it refers, and by art. 5 of that treaty Johore is a protected state only, because the Governor of the Straits Settlements undertakes to protect the Sultan's territory from external hostile attacks, and for that purpose Her Majesty's officers are to have access at all times to the waters of the State of Johore. By art. 6 the Sultan binds himself not to negotiate treaties, or enter into any engagement, with any foreign state. He has therefore deprived himself of the jus legationis, which is the most essential attribute of a ruling sovereign: Marten's Law of Nations, translated by Cobbett, 4th ed. book iv. c. 1,

(1) 5 P. D. 197.

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ss. 5, 6, p. 127. In *The Charkieh* (1) Sir Robert Phillimore, in order to ascertain the status of the Khedive of Egypt, examined the European treaties which concerned the relations between Egypt and the Porte, as well as the answer of the Foreign Office to the learned judge's inquiry.

Secondly, assuming the defendant to be an independent reigning sovereign, he has waived his immunity and privilege by coming into this country and making contracts as a private individual. The immunity attaches only to acts done by a sovereign in his character as sovereign. He can lay down his character as a prince, and put on that of a private individual at will. If he chooses to come to this country incognito, and assume the character of a private person, he is answerable to the jurisdiction of our Courts: Phillimore's Int. Law, 2nd. ed. vol. ii., § cxliv., p. 181; Wheaton, Int. Law, s. 101, 8th ed. by Dana, p. 161; Hall's Int. Law, 3rd ed., p. 167.

Though this view may seem to be opposed to some expressions used by the Court of Appeal in *The Parlement Belge* (2), it is to be observed that those expressions were really obiter. The question decided there was whether *The Parlement Belge* (2), which carried the mails, had or had not, by reason of its private trading, lost its character as a public ship. The action only dealt with property belonging to the King of the Belgians as a sovereign. There are, no doubt, many cases which shew that the Courts of this country have no jurisdiction over the public property of the sovereign of a foreign state, but there is authority for the proposition that they have jurisdiction over the private property of the sovereign found in this country. A similar principle should be applied to the public and private acts of sovereigns. In *Munden* v. *Duke of Brunswick* (3), Lord Denman, C.J., said that "sovereign princes may contract obligations in their private capacity on considerations purely personal." In *Duke of Brunswick* v. *King of Hanover* (4), the distinction was drawn between acts to be attributed to the character of sovereign and acts to be attributed to the character of subject. It was assumed in that case that, though King of Hanover, the

(1) Law Rep. 4 A. & E. 59.
(2) 5 P. D. 197.
(3) 10 Q. B. 656.
(4) 6 Beav. 1; 2 H. L. 1.

defendant might be subject to the jurisdiction in respect of acts done otherwise than in his character as a sovereign. In *Wadsworth* v. *Queen of Spain* (1), the action was brought against the Queen in her capacity as sovereign. Indeed, in all the cases the action has been brought against the defendant quâ sovereign, and the precise point which arises here has never yet been decided. In the report of *Wadsworth* v. *Queen of Spain* (1), in the *Law Journal*, Lord Campbell is reported as saying during the argument, at p. 492, "no doubt a foreign sovereign may be sued here for money borrowed for his private purposes." By his action in living here incognito under an assumed name, and contracting under such name, the defendant must be taken to have submitted to the jurisdiction.

WILLS, J. I entertain no doubt in this case. In the first place it is clear that the proper mode of obtaining information with respect to the status of the defendant was adopted by Wright, J., who communicated with and obtained a letter from the Colonial Office. We are told by that letter that the Sultan, "generally speaking, exercises without question the usual attributes of a sovereign ruler." It is true, as appears from the copy of the treaty annexed to that letter, that he has bound himself not to exercise some of the rights of a sovereign ruler except in certain particular ways; but that does not deprive him of his character as an independent sovereign. There can be no doubt that he is still an independent ruling sovereign, and this case must be decided upon exactly the same considerations as if the ruler of some undoubted great Power—such as the King of Italy, or the President of the French Republic—had been sued in the Courts of this country. To begin with, there is no precedent for saying that an independent sovereign ruler can be sued in our Courts. On the contrary, the proposition is opposed to every principle of international law as applied to the persons of sovereigns or those who represent them. The ground upon which the immunity of sovereign rulers from process in our Courts is recognised by our law is that it would be absolutely inconsistent with the status of an independent sovereign that he should be

(1) 17 Q. B. 171; 20 L. J. (N.S.) (Q.B.) 488.

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subject to the process of a foreign tribunal. It has been attempted in some cases—in that of *The Charkieh* (1), for instance—to say that a sovereign may lose his immunity and privileges by laying down his character as a sovereign and entering into trading transactions as a private person in another country; and our attention was called to certain dicta (which were not essential to the decision of the case) of Sir Robert Phillimore in *The Charkieh* (1) as supporting that view. But those dicta were dissented from in the judgment of the Court of Appeal in *The Parlement Belge.* (2) In the final part of the judgment that Court dealt with the very question of the amenability of a foreign sovereign to the process of our Courts, and held that one objection which was fatal to the attempt to bring the sovereign into the Admiralty Court by means of seizing a vessel, was that, quite independently of the right of the foreign sovereign to have the public property of his state respected, it was contrary to international law and the comity of nations that an independent foreign sovereign should be directly impleaded in the Courts of this country. A considerable part of the judgment is devoted to dealing with the case from that point of view. It was said that the process of attachment in the Court of Admiralty by seizing a vessel was an indirect mode of impleading the sovereign, although the sovereign was not personally made a defendant in the action, and that that which could not be done directly could not be done indirectly, and therefore that such a process could not be allowed, on the broad general principle that a reigning sovereign is not subject to the jurisdiction of a foreign country.

No authority of any kind to qualify that broad principle laid down by the Court of Appeal has been brought to our notice; but we have been referred to certain dicta of authors of treatises on international law. One of those dicta suggests that if an independent sovereign ruler comes into this country incognito, he is amenable to the jurisdiction of our Courts, although he chooses to claim his immunity. That dictum has never been acted upon, and the suggestion has probably arisen from a loose way of looking at the case of *Duke of Brunswick* v. *King of Hanover.* (3)

(1) Law Rep. 4 A. & E. 59. (2) 5 P. D. 197.
(3) 6 Beav. 1; 2 H. L. 1.

That was a very peculiar case, because the King of Hanover was not only a foreign sovereign, but also a British peer. He was sued in his character of a British peer, and it was alleged that the transactions, in respect of which it was sought to make him amenable to the jurisdiction of the Courts here, had nothing to do with his character of King of Hanover. It was said by the Court that, inasmuch as he had two distinct capacities, one of which did not touch his character and attributes as a ruling sovereign, he might be sued in the Courts of this country in respect of transactions done by him in his capacity as a subject. But the Sultan of Johore is in no sense a British subject.

It is said that he came to this country incognito. I do not know that he did. The affidavit says that he was passing under the name of Albert Baker. Unquestionably the plaintiff was under no misapprehension on the subject. According to her own affidavit she knew who and what he was in October, 1885. If anything turned upon the question of fact, I should say that it was not shewn that in August, 1893, when this writ was issued, he was here otherwise than as a sovereign prince. That seems to me, however, immaterial, because I am of opinion that, if he was in fact a sovereign prince when the action was brought, he was not, and is not subject to the jurisdiction of the Courts of this country simply because he was here incognito. I think that *Munden* v. *Duke of Brunswick* (1) is a strong authority against the proposition contended for by the plaintiff's counsel. To say that it is an authority in the plaintiff's favour is the result of a confusion of thought in respect of two propositions which ought to be kept distinct. It is one thing to say that a foreign sovereign is capable of making an effectual contract in this country; it is quite another thing to say that he can be sued in the Courts of this country. In *Munden* v. *Duke of Brunswick* (1) the Duke was sued for a debt due on an annuity deed. He pleaded that at the time of making the deed he was the reigning sovereign Duke of Brunswick and Lüneburg, and that "from the time of the making thereof continually, and at the time of the commencement of this suit, defendant has been and still is justly entitled to all the rights, prerogatives, and privileges appertaining to him as the Duke of

(1) 10 Q. B. 656.

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Brunswick and Lüneburg." The Court held the plea bad for not stating that the defendant was reigning sovereign Duke at the time when he was sued. They said that he might have been deposed, or have abdicated, before the action was brought. But the decision assumes that, if the plea had been drawn otherwise, and had contained all the material allegations, it would have been a good plea, and that view seems to me consistent with every authority on the subject. For these reasons, I am of opinion that the order for substituted service of the writ should be set aside, and that the order for a stay of proceedings should be made.

LAWRANCE, J. I am entirely of the same opinion, on the grounds which have been already given. I will only add that, in the same year in which the decision in *The Parlement Belge* (1) was given, James, L.J., one of the judges who decided that case, pointed out in *Strousberg* v. *Republic of Costa Rica* (2) the only two exceptions to the rule with respect to actions against foreign sovereigns. One is that, "where a foreign sovereign or state comes into the municipal courts of this country for the purpose of obtaining a remedy, then by way of defence to that proceeding—by way of counter-claim, if necessary, to the extent of defeating that claim—the person sued here may file a cross-claim, or take any other proceeding against that sovereign or state for the purpose of enabling complete justice to be done between them." The other exception is, "the case in which a foreign sovereign may be named as a defendant for the purpose of giving him notice of the claim which the plaintiff makes to funds in the hands of a third person or trustee over whom this Court has jurisdiction."

Motion granted.

W. A.

The plaintiff appealed.

Nov. 27, 28, 29. *G. White*, for the plaintiff. His argument was substantially to the same effect as in the Court below. [He cited, in addition to the authorities cited in the Court below,—Calvo, Droit International, 2nd ed. vol. 1, s. 508, p. 635; s. 513,

(1) 5 P. D. 197. (2) 44 L. T. Rep. 199.

p. 641; Marten's Law of Nations, translated by Cobbett, 4th ed. book iv. c. 5, s. 8, p. 184; Westlake's International Law, 3rd ed. s. 190, p. 226; Vattel, Law of Nations, translation by J. Chitty, ed. 1834, p. 485; Grotius, book ii. c. xiv.]

Finlay, Q.C. (*G. Wallace* with him), for the defendant. The dictum attributed to Lord Campbell in the report of *Wadsworth* v. *Queen of Spain* (1), in the *Law Journal*, must be wrongly reported. He may very probably have been intending to draw a distinction between cases in which a sovereign might contract as in a private capacity, and cases where he could not so contract; but he could not have intended to say that a sovereign could always be sued in the Courts of this country upon the former class of contracts. The dictum does not appear in the authorized reports. The only exceptions to the general rule that the Courts cannot exercise jurisdiction over an independent foreign sovereign are those stated by James, L.J., in *Strousberg* v. *Republic of Costa Rica.* (2) A sovereign may waive his privilege, but that can only be by submitting to the jurisdiction. Submission to the jurisdiction cannot be by anticipation before litigation, as suggested. There is no jurisdiction to hold a contentious inquiry into the acts of a foreign sovereign, and his intentions as deducible therefrom, with regard to the question whether he contracted as a private individual, or intended to submit to the jurisdiction. [He was stopped by the Court.]

G. White, in reply.

LORD ESHER, M.R. For the purposes of my judgment I must assume that the Sultan of Johore came to this country and took the name of Albert Baker, and that the plaintiff believed that his name was Albert Baker, and I will go so far as to assume for the present purpose that he deceived her by pretending to be Albert Baker, and then promised to marry her, and that he broke his promise. Whether these matters could be proved, if the case went further, is entirely another matter; but at the present stage of the case I will assume them to be true. At length, when he is sued, he alleges that he is a sovereign prince, and that no action can be maintained against him in the

(1) 17 Q. B. 171; 20 L. J. (N.S.) (Q.B.) 488. (2) 44 L. T. Rep. 199.

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municipal Courts of this country for anything which he has done. An elaborate argument has been presented to us on behalf of the plaintiff which was not altogether new, for I remember to have heard something very like it in the case of *The Parlement Belge*. (1) In this argument there was only one point which appeared to have much weight, viz., that very great judges in the House of Lords and in the Queen's Bench had formerly declined to determine the principal point now raised. If the matter had stood there, I should have thought that it might be necessary for us to look into all the authorities on the subject. But I think that we did so in the case of *The Parlement Belge* (1), and that the point in this case is not now before the Court of Appeal for the first time, but was really decided in that case, which decision would, of course, be binding on us in the present case, even if any of us did not agree with it.

The first point taken was that it was not sufficiently shewn that the defendant was an independent sovereign power. There was a letter written on behalf of the Secretary of State for the Colonies, on paper bearing the stamp of the Colonial Office, and which clearly came from the Secretary of State for the Colonies in his official character. He is in colonial matters the adviser of the Queen, and I think the letter has the same effect for the present purpose as a communication from the Queen. It was argued that the judge ought not to have been satisfied with that letter, but to have informed himself from historical and other sources as to the status of the Sultan of Johore. It was said that Sir Robert Phillimore did so in the case of *The Charkieh*. (2) I know he did; but I am of opinion that he ought not to have done so; that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign. For this purpose all sovereigns are equal. The independent sovereign of the smallest state stands on the same footing as the monarch of the greatest.

It being established that the defendant is in that position, can he be sued in the Courts of this country? It is not contended

(1) 5 P. D. 197. (2) Law Rep. 4 A. & E. 59.

that he could, unless by coming into this country, and living there under a false name, and—I will assume for the present purpose—by so deceiving the plaintiff, he has lost his privilege as an independent sovereign and made himself subject to the jurisdiction. In the case of *The Parlement Belge* (1) the whole subject was carefully considered. As I have pointed out, great judges in the House of Lords and the Queen's Bench had in previous cases declined to decide this point, but I think that this Court was there called upon to decide the point, and did decide it. I said, in giving the judgment of the Court in that case, after citing passages from various authorities, and a minute examination of the cases on the subject (see p. 214 of the report), "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." It appears to me that, by the authority of this Court, the rule was thus laid down absolutely and without any qualification. We had not then to deal with the question of a foreign sovereign submitting to the jurisdiction; everybody knows and understands that a foreign sovereign may do that. But the question is, How? What is the time at which he can be said to elect whether he will submit to the jurisdiction? Obviously, as it appears to me, it is when the Court is about or is being asked to exercise jurisdiction over him, and not any previous time. Although up to that time he has perfectly concealed the fact that he is a sovereign, and has acted as a private individual, yet it is only when the time comes that the Court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction. If it is then shewn that he is an independent sovereign,

(1) 5 P. D. 197.

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and does not submit to the jurisdiction, the Court has no jurisdiction over him. It follows from this that there can be no inquiry by the Court into his conduct prior to that date. The only question is whether, when the matter comes before the Court, and it is shewn that the defendant is an independent sovereign, he then elects to submit to the jurisdiction. If he does not the Court has no jurisdiction. It appears to me that this is the result of the principles laid down in *The Parlement Belge*. (1) Therefore, I think the Court has no jurisdiction to enter into any inquiry into the matters alleged by the plaintiff, the defendant being an independent sovereign, and not submitting himself to the jurisdiction. For these reasons the appeal must be dismissed.

LOPES, L.J. It was contended for the plaintiff that the status of the defendant had not been satisfactorily established; but I am clearly of opinion that it was, and that the defendant is an independent sovereign. That such a sovereign is entitled to immunity from the jurisdiction of our Courts is beyond all question. That proposition was established, if it needed to be further established, by the case of *The Parlement Belge*. (1) The law on the subject is clearly laid down by Vattel. He says (Law of Nations—Translation by J. Chitty — ed. 1834, p. 485): "We cannot introduce in any more proper place an important question of the law of nations which is nearly allied to the right of embassies. It is asked what are the rights of a sovereign, who happens to be in a foreign country, and how is the master of that country to treat him? If that prince be come to negotiate, or to treat about some public affair, he is doubtless entitled, in a more eminent degree, to enjoy all the rights of ambassadors. If he be come as a traveller, his dignity alone, and the regard due to the nation which he represents and governs, shelters him from all insult, gives him a claim to respect and attention of every kind, and exempts him from all jurisdiction." But there is no doubt that a foreign sovereign may submit to the jurisdiction of the Courts of this country, and it was contended that in this particular case he had

(1) 5 P. D. 197.

so submitted, because he had taken an assumed name and acted as a private individual. We are asked from that to infer the fact of submission to the jurisdiction. I am of opinion that no such inference can be drawn. In my judgment, the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, by appearance to a writ. That he intends to waive his rights by taking an assumed name cannot be inferred. On this point I will again refer to Vattel's Law of Nations, p. 485, where he says: "On his making himself known, he cannot be treated as subject to the common laws; for it is not to be presumed that he has consented to such a subjection; and, if a prince will not suffer him in his dominions on that footing, he should give him notice of his intentions."

It seems to me clear, therefore, that in this case there was no submission to the jurisdiction, and nothing from which such submission could be inferred. For these reasons I agree that the appeal should be dismissed.

KAY, L.J. The status of a foreign sovereign is a matter of which the Courts of this country take judicial cognisance—that is to say, a matter which the Court is either assumed to know or to have the means of discovering, without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign. Of course, the Court will take the best means of informing itself on the subject, if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany. Here the person cited was the Sultan of Johore, and the means which the judge took of informing himself as to his status was by inquiry at the Colonial Office. In answer to that inquiry there came a letter from that office, signed by an official there, and purporting to be written by the direction of the Secretary of State for the Colonies, to the effect which has been stated. It was contended that that letter was not sufficient, and did not satisfactorily establish the status of the defendant as an independent sovereign. I confess I cannot conceive a more satisfactory mode of obtaining information on the subject than such

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a letter. Proceeding as it does from the office of one of the principal secretaries of state, and purporting to be written by his direction, I think it must be treated as equivalent to a statement by Her Majesty herself, and, if Her Majesty condescends to state to one of her Courts of Justice, that an individual cited before it is an independent sovereign, I think that statement must be taken as conclusive. But it was argued that the letter itself contains, by reference, a confutation of its statements; that it refers to a treaty, and, on looking to that treaty, it appears that its terms are, in effect, that the Sultan should have certain protection, he on his part engaging not to enter into treaties with any foreign Powers; and that such a treaty amounts to an abnegation of his sovereign powers which destroyed his position as an independent sovereign. But, if he is not an independent sovereign, he must be a dependent one. I asked during the argument on whom he was dependent, and failed to get a satisfactory answer. The agreement by the Sultan not to enter into treaties with other Powers does not seem to me to be an abnegation of his right to enter into such treaties, but only a condition upon which the protection stipulated for is to be given. If the Sultan disregards it, the consequence may be the loss of that protection, or possibly other difficulties with this country; but I do not think that there is anything in the treaty which qualifies or disproves the statement in the letter that the Sultan of Johore is an independent sovereign.

The next point is this. It is said that an independent sovereign may waive his right to immunity, and may treat himself as subject to the jurisdiction. I agree; but how is that to be done? This seems to me, in the first place, quite clear. Supposing, by way of illustration, that some well-known potentate, such as one of the great European emperors, were to be sued in a Court of this country, and took no kind of notice of the proceeding; it would be the duty of the Court to recognise his position, and to say at once that the person cited was an independent foreign sovereign over whom it had no jurisdiction. Therefore it is not right to say that such a sovereign must come forward and assert his right. I do not think that he need. I

think the Court itself would be bound to take notice of the fact that it had no jurisdiction. But it is said that by the acts which the defendant previously committed he waived his rights; that, wishing to conceal his position, he came to this country as a private individual under the name of Albert Baker, and under that name entered into the contract with the plaintiff upon which this action is founded; and that, by so doing, he shewed that he intended to be treated while he lived in this country as a private individual, and as such to be subject to all jurisdiction which the Courts of this country could have over a private individual. That raises the question whether a sovereign who so acts, who—I will assume—has lived in this country perfectly incognito, thereby waives all his privilege as an independent sovereign. No case has been cited to that effect; the nearest approach to an authority on the subject is a dictum of Lord Campbell in the case of *Wadsworth* v. *Queen of Spain* (1), as reported in the Law Journal. That case is reported in two places, one being the authorized report in the Queen's Bench Reports, the other the report in the Law Journal. The dictum in question only appears in the latter. It does not appear to me that under those circumstances it is of very great authority. I cannot help suspecting that, when the authorized report came before Lord Campbell for revision, as it may very likely have done, he struck the dictum out, not wishing it to appear. Besides this dictum, the only authorities relied on were certain passages in text-books which appear to be founded upon it. In the text-books of writers of great authority, such as Vattel, nothing of the kind is to be found; there is no intimation that such matters as those here relied on amount to a waiver of immunity when the sovereign comes to be sued. The passage cited from Vattel by Lopes, L.J., is emphatic on this very point, and shews that the time at which the immunity is to be waived must be when an action is brought against the foreign sovereign, and when it is brought to the attention of the Court by reason of its judicial knowledge or from other information that the person sued is a foreign sovereign. I should put it thus: the foreign sovereign is entitled to immunity from civil proceedings in the Courts

(1) 17 Q. B. 171; 20 L. J. (N.S.) (Q B.) 488.

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of any other country, unless upon being sued he actively elects to waive his privilege and to submit to the jurisdiction. Here the defendant has not done that, but just the contrary. For these reasons I agree with the Divisional Court in thinking that the defendant is entitled, as a foreign sovereign, to be treated as free from liability to be sued in this country; and that he has done nothing to waive that right. I should say, if it were necessary to decide the question, that it is not shewn that there was any deception in the case, because the plaintiff admits that from 1885 to 1893 she was aware of the status of the defendant. But however that may have been, the principle being well settled by abundant authority that, unless the foreign sovereign chooses to waive his rights when sued, he is not liable to the jurisdiction of the Courts of this country, I think that this appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Colyer & Colyer.*
Solicitor for defendant: *E. F. Turner.*

E. L.

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BOWEN *v.* ANDERSON.

Nuisance—Reversioner, Liability of—Landlord and Tenant—Weekly Tenancy—Necessity for Notice to determine—Injury caused by defective Repair of demised Premises.

The plaintiff was injured through a defect in the condition of a coal-plate in the pavement in front of a house let by the defendant on a weekly tenancy. The evidence shewed that the defect had existed for some months before the accident, but was conflicting as to whether the accident was owing to the neglect of the tenant to secure the plate properly, or to the defective state of the flagstone, or to the presence of clay, which prevented the plate from fitting.

The county court judge directed a verdict for the plaintiff, the amount of damages being agreed.

On appeal:—

Held, that a weekly tenancy does not determine without notice at the end of each week, but some notice is required to determine such a tenancy, that the continuance of the tenant's occupation on the expiration of each week did not render the defendant liable for defects then existing, as if there had been a re-letting, that it was a question for the jury whether the injury was caused by

the negligence of the tenant, or by a structural defect existing at the date of the original letting, for which the defendant would be liable, and there must be a new trial.

Sandford v. *Clarke* (21 Q. B. D. 398) discussed, and the grounds of the decision disapproved.

APPEAL by the defendant from the ruling of the judge of the county court at Salford, directing a verdict for the plaintiff.

The action was brought to recover damages for personal injury. The plaintiff while walking along the street trod on a grid or coal-plate which covered the hole in the flagstone which was used for letting down coals into a coal-cellar in front of a house. The grid turned, and the plaintiff fell and her leg went through the hole, and she was injured. The claim was made against the defendant as landlord (1) of the house to which the coal-cellar belonged. The house was let on a weekly tenancy, and the tenant had been in occupation for four years. Before the tenant went into the house the defendant had supplied a bar and a screw, which if properly used would have held the grid firm in its place, but the tenant never used the bar and screw, but fastened the grid with a rope. Witnesses called for the plaintiff stated that the flag was worn away. The defendant, who examined the flag after the accident, stated that on the rim, which ought to have supported the grid if it had been properly fixed over the hole, a quantity of clay had collected, which had become so hard that a chisel had to be used to remove it. When repairs were needed the tenant used to apply to the defendant. Two other accidents had previously taken place on the same grid. At the trial, with a jury, the defendant's counsel admitted that there was negligence, but contended that it was the negligence of the tenant and not of the defendant.

The county court judge referred to the judgment in *Sandford* v. *Clarke* (2), and ruled that, assuming the accident was due to the condition of the flag, the plaintiff was entitled to recover, whether the flag was worn away or was rendered dangerous by hardened clay as described by the defendant, for in either case

(1) The defendant had sold the property, and was acting as agent for the purchasers, but the point was not raised as a defence, and the case was treated as if the defendant were the landlord.

(2) 21 Q. B. D. 398.

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the landlord was liable. Upon that ruling it was agreed that the verdict must be for the plaintiff, and a verdict was entered for 20*l.*, the amount being agreed, with leave to appeal.

Le Riche, for the defendant. The county court judge was wrong in directing a verdict for the plaintiff. The judgment in *Sandford* v. *Clarke* (1), so far as it deals with the determination of a weekly tenancy, ought not to be extended, and the present case is distinguishable, because here, whichever view is taken of the evidence relating to the cause of the injury, it was caused, either by the negligence of the tenant in neglecting to use the proper means for securing the grid, which the defendant had provided, or by the negligence of the road authority in sweeping the mud in such a way that it accumulated on the rim of the hole. In neither view of the case can the defendant be liable, and there ought to have been a nonsuit, or, if this is not so, at least it ought to have been left to the jury to find whose negligence caused the injury. The agreement at the trial only comes to this, that if the ruling is correct the plaintiff is entitled to recover. There is nothing inconsistent with that agreement in the defendant's present contention, which is that the ruling was incorrect in law.

[He also referred to *Rex* v. *Pedly* (2); *Gandy* v. *Jubber*. (3)]

T. G. Carver, for the plaintiff. The defendant is precluded by the agreement at the trial from questioning the ruling of the county court judge. The judge was right in following the judgment in *Sandford* v. *Clarke* (1), for the evidence shewed a structural defect, for which the defendant must be liable.

WILLS, J. I am of opinion that this case must go down for a new trial. Some very essential questions have been assumed, which ought to have been left to the jury to decide. I do not think the agreement of the parties, that upon the county court judge's ruling the verdict must be for the plaintiff, prevents the defendant from raising the question now sought to be raised, which challenges the correctness of that ruling. It was a ques-

(1) 21 Q. B. D. 398. (2) 1 A. & E. 822.
(3) 5 B. & S. 78; 9 B. & S. 15.

tion for the jury whether there was a structural defect or a defect of management, and it ought also to have been left to the jury to say whether proper means for making the grid safe had been provided, and whether, if the tenant had used the means which were provided, the accident would have happened. The learned county court judge assumed that the presence of hard clay on the edge of the hole was a structural defect, and that it was the cause of the accident, and that if the tenant had used the means provided the accident would still have happened; but these were all questions for the jury.

I think the decision in *Sandford* v. *Clarke* (1) was right, but I think the grounds on which the judgment was based were not right. It is my own decision, and therefore I feel the more free to criticise it. The evidence in that case was that a structural defect existed at the time of the accident, that the same tenant had been in possession for about two years before the accident, and that the coal-plate was out of repair about a fortnight after she entered into possession, so that it might I think be inferred that the defective state of repair had existed at the time of the letting. That being so, there was evidence which would have supported a verdict for the plaintiff, and the nonsuit was wrong. But I think we were mistaken in holding that a weekly tenancy comes to an end at the end of each week. I can see how the misapprehension arose. The attention of the Court was not called to the case of *Jones* v. *Mills* (2), and that decision was overlooked in giving judgment. It was assumed on behalf of the plaintiff in *Sandford* v. *Clarke* (1) that a weekly tenancy comes to an end at the end of each week, and this proposition was not controverted on the part of the defendant, except by reference to *Gandy* v. *Jubber* (3), which was a case of a yearly tenancy. In *Jones* v. *Mills* (2) the question arose as to whether any notice was necessary to determine a weekly tenancy, and all the four members of the Court agreed that some notice was necessary, because the tenancy did not come to an end of itself at the end of each week. Williams, J., thought a week's notice ought to be given, while Willes, J., appears to have

(1) 21 Q. B. D. 398. (2) 10 C. B. (N.S.) 788.
(3) 5 B. & S. 78; 9 B. & S. 15.

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thought that no particular length of notice need be given, unless perhaps it might be half a week, as suggested by Parke, B., in *Huffell* v. *Armitstead.* (1) It is clear, however, that all the judges thought there must be some notice. No doubt if that decision had been present to our minds, *Sandford* v. *Clarke* (2) would not have been decided on the ground on which it was decided. I am glad to see that in the last editions of Woodfall's Landlord and Tenant, 15th ed. p. 776, and Roscoe's Nisi Prius Evidence, 16th ed. p. 1009, it is pointed out that *Jones* v. *Mills* (3) was not referred to in *Sandford* v. *Clarke* (2), while in Woodfall's Landlord and Tenant, 15th ed. p. 776, it is suggested that it is hard to reconcile *Sandford* v. *Clarke* (2) with the authorities. So far as the grounds of the decision go, I agree with the criticism.

COLLINS, J. I am of the same opinion on both points.

Appeal allowed.
Order for a new trial. (4)

Solicitor for plaintiff: *J. H. Lloyd, Manchester.*

Solicitor for defendant: *Victor Thomasset, for Joseph Sims, Manchester.*

(1) 7 C. & P. 56.

(2) 21 Q. B. D. 398.

(3) 10 C. B. (N.S.) 788.

(4) See *Harvey* v. *Copeland,* 30 L. R. Ir. 412, where notice was given on Thursday, November 5, to determine, on or before Friday, November 13, a weekly tenancy which commenced on a Thursday. Gibson, J., held (1.) that reasonable notice was required; (2.) that reasonable notice meant a week's notice; (3.) that the notice must end with the current week, and therefore the notice given was insufficient. Johnson, J., held that reasonable notice, but not necessarily a week's notice, was requisite, and the notice given was sufficient. O'Brien, J., held that a week's notice was necessary, and the notice given was more than sufficient. In *Jones* v. *Mills,* 10 C. B. (N.S.) 788, Erle, C.J., held that some notice was required, was inclined to think reasonable notice sufficient, but did not decide. Williams, J., said it was unnecessary to determine as to the length of notice required, but thought it should be a week. Willes, J., expressed his readiness to adopt the view that some notice was necessary, did not decide what notice, was not prepared to assent to a week, and suggested possibly half a week. Byles, J., held that reasonable notice was required, but did not decide what notice would be reasonable.

P. B. H.

BOND, Appellant *v.* PLUMB, Respondent. 1893 Dec. 4.

Gaming—Place used for Betting—Conviction for Keeping Room for Betting—Validity of Conviction though no Deposit Received—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

By s. 1 of the Betting Act, 1853, "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, ... betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, &c., as or for the consideration for any assurance, undertaking, promise, or agreement . . . . to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, &c.; and s. 3 imposes a penalty.

The appellant was charged with keeping a room, being the occupier, for the purpose of betting with persons resorting thereto, and the justices found that he had kept the room for that purpose; but it was not shewn that he kept it for the purpose of receiving deposits on bets:—

Held, that s. 1 creates two separate and distinct offences, namely, keeping, &c., the places referred to, first, for the purpose of betting with persons resorting thereto, and, secondly, for the purpose of receiving deposits on bets, that the offence under the first part of the section was complete, and the appellant was rightly convicted.

Case stated by justices.

An information was laid charging the appellant that he, being the occupier of a certain office or room in a certain house, unlawfully did open and keep the said office or room for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to horse-races, contrary to the form of the statute.

The proceedings were taken under and by virtue of the first portion of s. 1 and s. 3 of the Betting Act, 1853 (16 & 17 Vict. c. 119). (1)

(1) By 16 & 17 Vict. c. 119, s. 1: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise,

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It was proved that the appellant had issued and published an advertisement as follows:—

"W. Bond & Co. Turf Accountants, 6, Colonnade Gardens, Eastbourne. The Derby, Oaks, Ascot Stakes, and all future events. Terms on application. Business personally conducted. Telegraphic address, 'Common,' Eastbourne."

In consequence thereof betting had taken place with the appellant, or with some person procured by him, at the said premises, and certain telegrams and letters had been received by the appellant at the premises from persons making bets on certain horse-races with the appellant and persons procured by him, and having reference to betting transactions, and requesting that certain stakes should be made, the settlement of which should depend upon the result of horse-races. Similar papers were also found upon the premises, and also books having reference to betting transactions.

It was contended on behalf of the appellant that the words of the first portion of s. 1 of 16 & 17 Vict. c. 119 did not constitute an offence, and consequently that none was disclosed by the information, and that only an offence was constituted by the whole of the section, whereas the information had been laid under the first portion of it only.

The justices were of opinion that the room had been kept by the appellant for the purpose of the occupier (being the appellant) using the same for betting with persons resorting thereto, and that this was an offence within the meaning of the first portion of s. 1, and convicted the appellant.

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or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

By s. 3: "Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them," is made liable to a penalty not exceeding 100*l.*

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The question for the opinion of the Court was,—

Does the first portion of the section constitute an offence, and was it sufficient that the justices should have been satisfied (as they were) that the room was kept for the purpose of the appellant betting with persons resorting thereto? (1)

Dale Hart, for the appellant. The conviction is wrong, because it is not shewn that any deposit was received. The preamble to the Betting Act, 1853, shews that the gaming sought to be prohibited was gaming "by the opening of places called betting-houses or offices, *and* the receiving of money in advance," and s. 1 does not go beyond that. In *Bows* v. *Fenwick* (2), Brett, J., after referring to the words of the preamble, says: "That discloses the kind of gaming which was sought to be suppressed." The judgments of Lush, J., in *Haigh* v. *Town Council of Sheffield* (3), and of Hawkins, J., in *Reg.* v. *Cook* (4), shew that the Act is not aimed at all betting, but only at a particular kind. It is true that there is no decision directly in point, and in *Haigh* v. *Town Council of Sheffield* (5) Blackburn, J., says: "While it is quite plain that the latter part of s. 1 is confined to the kind of betting mentioned in the preamble, I think it is not so clear that the first part of the section may not extend further;" but he does not decide the point, and in all the cases the receipt of a deposit has been proved. The question is not affected by the repeal of the preamble by 55 & 56 Vict. c. 19, for that repeal was only for the purpose of convenience, being effected by a Statute Law Revision Act, and was not intended to alter the effect of the statute. The preamble may still be looked at for the purpose of construction. It is stated in Coke's Institutes, part iv. c. 74, p. 330, that "the preamble is to be considered, for

(1) A second case was stated on an information under the second part of s. 1; but as the justices found "that it was a condition of business that cover should be deposited for the business that was done—namely, that money should actually be received before the bet was made," which finding was considered by the Court to bring the case clearly within the exact words of the section, a detailed report is unnecessary. The conviction was affirmed.

(2) Law Rep. 9 C. P. 339, at p. 345.

(3) Law Rep. 10 Q. B. 102.

(4) 13 Q. B. D. 377.

(5) Law Rep. 10 Q. B. 102, at p. 106.

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it is the key to open the meaning of the makers of the Act, and mischiefs which they intend to remedy."

Boxall, for the respondent. Sect. 1 is disjunctive, and deals with two separate and distinct offences—first, opening, keeping, or using houses, &c., for the purpose of betting with persons resorting thereto; and secondly, using such places for the purpose of receiving deposits on bets. [He was stopped.]

LORD COLERIDGE, C.J. The preamble to the Betting Act, 1853 (16 & 17 Vict. c. 119), was as follows: "Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies." These words clearly point to two separate and distinct evils, which it was the object of the legislature to suppress—first, the opening of betting houses; and secondly, the receiving of money in advance. I will assume that s. 1 of the Act does not go beyond the preamble, though, if it did, I am clear that the words of the section ought to prevail. But s. 1 of the Act, as well as the preamble, deals with separate offences, and, as Mr. Boxall has pointed out, is a disjunctive provision. The first part of the section, which corresponds with the first part of the preamble, prohibits the opening, keeping, or using of any house, office, room, or other place, for the purpose of the owner, occupier, &c., betting with persons resorting thereto; and the second part, which corresponds with the second part of the preamble, continues: "Or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, &c., as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, &c." Therefore the two parts of the section, as well as the two parts of the preamble, deal with separate and distinct offences. I do not think I need go into all the cases on the subject, for Mr. Hart frankly admits that the

point is left open by the decisions. I think the passage which has been cited from the judgment of Brett, J., in *Bows* v. *Fenwick* (1), is not so important with regard to the point now raised as it appears to have been considered to be in *Haigh* v. *Town Council of Sheffield* (2), for in the latter case Blackburn, J., appears to have thought that *Bows* v. *Fenwick* (3) was a case on this point; but it was not so, for the whole judgment turned on the question whether the appellant was using a "place" within the meaning of the Act. The receipt of money was proved, and was not in dispute, and therefore the contention now raised was not available in that case, and the Court had not the point to decide.

For these reasons I am of opinion that the appellant was rightly convicted.

COLLINS, J., concurred.

Judgment for the respondent.

Solicitor for appellant: *F. Lawson Lewis, Eastbourne.*

Solicitors for respondent: *Sharp, Parker, Pritchard & Barham, for H. W. Forvargue, Eastbourne.*

(1) Law Rep. 9 C. P. 339, at p. 345. (2) Law Rep. 10 Q. B. 102.
(3) Law Rep. 9 C. P. 339.

P. B. H.

C. A.

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Nov. 29.

[IN THE COURT OF APPEAL.]

SMITH & SERVICE *v.* ROSARIO NITRATE COMPANY, LIMITED.

Ship—Charterparty—Restraints of Princes and Rulers—Demurrage—Customary Mode of Loading.

The defendants chartered the plaintiffs' vessel to load a cargo of nitrate at Iquique in Chili, at the rate of 200 tons per working lay day, to be reckoned from the day the vessel was ready to receive cargo to the day of her despatch, "restraints of princes and rulers, political disturbances or impediments during the said voyage always mutually excepted." The charterparty gave the ship liberty to call at any ports in any order. There was at Iquique only storage for a small quantity of nitrate, and the customary mode of loading there was to send the nitrate down direct by rail from the mines to the port, and there put it on board ship as required.

When the plaintiffs' vessel arrived at Iquique, a civil war had broken out in Chili, and delay occurred in loading the vessel, in consequence of the railway from the mines to Iquique being in the hands of the troops, so that nitrate could not be sent down from the mines to the port. That state of things subsequently ceasing, the cargo was loaded and the vessel sailed upon her voyage. Being short of coal, which was very dear at Iquique, she put into another Chilian port for it. The Chilian government in power there demanded payment of export duties, such duties having already been paid to the de facto government in power at Iquique, and the ship was detained there for ten days in default of payment of such duties. An action having been brought by the plaintiffs for demurrage:—

Held, that both the above-mentioned delays fell within the exception clause in the charterparty.

APPEAL from the judgment of Pollock, B., on further consideration.

The action was upon a charterparty for demurrage of a steamer of the plaintiffs called the *Mount Tabor*.

The facts, which are given in detail in the judgment of the learned judge in the Court below (1), may be summarised as follows: By the charterparty the ship was chartered by the defendants to load at Iquique a cargo of nitrate of soda in bags, and thence proceed to ports in the United Kingdom or on the Continent, as ordered by the charterers. The cargo was to be placed by the shippers alongside of the steamer at shippers' risk and expense. For the loading of the cargo 200 tons per working

(1) [1893] 2 Q. B. 323.

lay day was to be allowed, to be reckoned from the day the vessel was ready to receive cargo to the day of her despatch and ten running days on demurrage at the rate of 8*d.* per register ton per day, to be paid daily for each and every day's detention, "restraint of princes and rulers, political disturbances or impediments, earthquakes, fire, pirates and enemies, the dangers of the seas and navigation, &c., during the said voyage always mutually excepted." The charterparty gave the ship liberty to call at any ports in any order. It appeared that at the port of Iquique there was only storage for about 1000 tons of nitrate, it not being the practice for the producers of nitrate to keep larger quantities there than was sufficient to commence the loading of vessels in the bay and shortly to arrive, because, if the nitrate were stored for a long period, there was a loss incurred by drainage and the bags rotted, causing the nitrate to cake, which necessitated its being dug out and re-bagged, occasioning great expense and loss of time. The learned judge found that the customary mode of loading at the port was "by sending the nitrate down direct by rail from the mines to the port and the quay, and putting it on board the vessel as acquired at the mine." When the *Mount Tabor* arrived at Iquique, a civil war had commenced in Chili, and by reason of fighting going on at Iquique itself, and the port being blockaded, it was then impossible to load any nitrate there. Subsequently, although the blockade was raised and fighting was not actually going on at Iquique itself, it was going on up the country, and the railway by which the nitrate was sent down from the mines to the place of loading was occupied from time to time by the troops, and it was impossible to bring nitrate down from the mines. After a time that state of things ceased, and it became possible to load. The ship thereupon loaded her cargo and sailed from Iquique. Being in need of coal, which was very dear at Iquique, she put into another port in Chili called Coronel on her way to obtain coal. The Chilian government in power there demanded payment of export duties, which had already been paid to the de facto government in power at Iquique, and in default of payment of such duties they detained the vessel for ten days. It was not disputed that the delay whilst the port of Iquique was blockaded was covered by the exception clause with

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regard to restraint of princes, &c., in the charterparty, but the plaintiffs contended that the exception clause did not cover the period of delay in loading after the blockade was raised, or that of the delay that occurred at Coronel. Unless those periods were covered by the exception clause demurrage had been incurred. The learned judge held that both the last-mentioned delays were within the exception clause, and therefore gave judgment for the defendants.

Joseph Walton, Q.C., and *Hollams*, for the plaintiffs. The exception clause does not apply to anything which precedes the actual loading. It is the charterer's duty to provide a cargo ready for loading at the place of loading. The act of loading may include putting the cargo into lighters and conveying it in lighters to the ship, where the ship is to be loaded from lighters and not alongside a quay or wharf. This was the case in *Hudson* v. *Ede* (1), upon which the learned judge below founded his judgment. There the cargo had to be brought down a river in lighters, there being no storehouses at the port, and the river was blocked with ice. That case is distinguishable from the present. It was the ordinary case of loading by means of lighters, and the only peculiarity of the case was the long distance which the cargo had to be brought in lighters, viz. 110 miles down a river. It is contended that that decision was a very strong one, and ought not to be extended to a case of land transit by railway such as this.

[LORD ESHER, M.R. The decision does not appear to depend on any distinction between land and water transit. Suppose the cargo were stored at some warehouse some distance behind the dock, would not the loading include bringing it from such warehouse?]

In that case the cargo would be at the port of loading, and it might be that the land transit there would be part of the loading. But in the present case the cargo is not at the place of loading. It is submitted that land transit from some inland place to the place of loading cannot be part of the act of loading. In *Grant* v. *Coverdale* (2), Lord Selborne, L.C., said that it is the duty of

(1) Law Rep. 3 Q. B. 412. (2) 9 App. Cas. 470, at p. 476.

the charterer to convey the cargo to the place of loading, and have it there ready to be put on board; and it was held there that the conveyance of the cargo by canal to the dock was not part of the loading.

[LORD ESHER, M.R. There was no finding in that case that that was the only mode of loading at the port, as there was in the case of *Hudson* v. *Ede*. (1)]

With regard to the delay at Coronel, that arose not from anything within the exception clause, but from the fact that the export duties demanded were not paid. It is the duty of the charterers to provide for all custom house duties on cargo. At any rate, it cannot be taken that the shipowner undertakes the risk of the detention of the ship by reason of a dispute as to such duties. Any difficulty arising as to them is the charterer's misfortune.

[LORD ESHER, M.R. Did not this delay arise in consequence of political disturbances? The payment of duties in the ordinary course was prevented by the fact that the port of loading was in the hands of the insurgents.]

[They also cited the *Alne Holme*. (2)]

R. T. Reid, Q.C., and *J. W. Mansfield*, for the defendants, were not called upon.

LORD ESHER, M.R. I am of opinion that on the learned judge's finding of fact, upon which we must act, unless we can clearly see our way to the conclusion that it is wrong, his decision in point of law was correct. The effect of his finding appears to be that the customary mode of loading nitrate at Iquique was that the nitrate was not brought away from the mines until it was wanted to be put on board the ship; it was then loaded on trucks and sent down direct from the mines to the port and put on board the ship. It appears that there was a warehouse at Iquique, and that the nitrate was unloaded from the trucks and taken to this warehouse, not for the purpose of being left there, but of being put into lighters; but the whole constituted one operation, and was treated by everybody at Iquique as the customary mode of loading there. Such being the customary

(1) Law Rep. 3 Q. B. 412. (2) [1893] P. 173.

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mode of loading at Iquique, those who entered into a charter-party, by which the ship was to load there, must be taken to have known that this was so, and to have contracted accordingly. Therefore the contract with regard to the loading of the ship, and the exceptions, must be taken to have been made with reference to the recognised custom and mode of loading. That being so, the case comes exactly within the authority of *Hudson* v. *Ede.* (1) The bringing of the nitrate down must be considered as part of the loading, and, if the cargo cannot be loaded in the recognised manner by reason of something which is within the exception clause, the charterer is not responsible. It seems to me that the finding of the learned judge was right, and that the law was correctly applied to it. Therefore the appeal must be dismissed. The case is really governed by *Hudson* v. *Ede.* (1) It is no use at this time of day to say that that was a very strong decision. It has not been overruled, but on the contrary has been recognised in the House of Lords, and is a decision binding on us.

LOPES, L.J. Having regard to the finding of the learned judge, which I cannot hold to be wrong, this case is concluded by the decision in *Hudson* v. *Ede.* (1)

KAY, L.J. Before the decision in *Hudson* v. *Ede* (1), I think such a case as this would have been very arguable. That was a decision of the Exchequer Chamber, and it has been recognised in the case of *Postlethwaite* v. *Freeland* (2), in the House of Lords by Lord Blackburn, and again by Lord Selborne, who distinguished it in the case of *Grant* v. *Coverdale, Todd & Co.* (3) The only question, therefore, that can be argued, is whether this case comes within the authority of *Hudson* v. *Ede.* (1) An attempt was made to distinguish the present case in this way. It was said that in *Hudson* v. *Ede* (1), it being part of the ordinary duty of the charterers to bring the cargo to the ship's side in lighters by river, the goods began to be shipped when they were put into lighters; but that the fact that the nitrate had in the

(1) Law Rep. 3 Q. B. 412. (2) 5 App. Cas. 599.
(3) 9 App. Cas. 470.

present case to be brought by rail made a distinction, and the land transit would not form part of the loading. But it seems to me that, if it is found, as it is in this case, that by the recognised custom of the port the mode of loading was by bringing the nitrate from the mines by rail direct to the ship's side, it is impossible to distinguish this case from *Hudson* v. *Ede* (1), and the bringing of the cargo from the mines by rail is part of the loading, just as the bringing of the cargo down the river by lighters was in that case. For these reasons I think the appeal fails.

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Appeal dismissed.

Solicitors for plaintiffs: *Hollams, Sons, Coward & Hawkesley.*
Solicitors for defendants: *Norton, Rose, Norton & Co.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1893 *Nov.* 8.

BULMAN & DICKSON *v.* FENWICK AND COMPANY.

Ship—Charterparty—Option of Charterer as to Port of Discharge—Unloading delayed by Strike at Port to which Vessel ordered.

A charterparty, which contained an exception of any delay occasioned by strikes, provided that the vessel, when loaded with coal, should proceed to one of certain named places on the Thames, as ordered, and there unload. The charterers ordered her to proceed to R., one of such places. After the voyage commenced, and before the arrival of the vessel at the mouth of the Thames, the charterers became aware of a strike among the coal porters at R., which did not extend to the other places named in the charterparty. In consequence of the strike it was impossible for the vessel to unload at R. within the time allowed by the charterparty.

In an action by the shipowners for demurrage:—

Held, affirming the judgment of Pollock, B., that there was no obligation upon the charterers to change the order for the vessel to proceed to R. on the strike coming to their knowledge; and that, the delay being covered by the exception, no demurrage was payable.

FURTHER consideration.

The facts and arguments sufficiently appear from the judgment.

Bucknill, Q.C., and *Scrutton*, for the plaintiffs.
Bigham, Q.C., and *Leck*, for the defendants.

Cur. adv. vult.

(1) Law Rep. 3 Q. B. 412.

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Aug. 10. POLLOCK, B. This action was tried before me, with a special jury, at the Guildhall, in the month of June last. The action was brought by shipowners against charterers for demurrage of a ship called the *Ashdene*, which was chartered on a coal charter from the Tyne to the Thames, and the claim was practically in respect of a period during which the *Ashdene* was lying at the Regent's Canal, to which she had been consigned, waiting to unload, but unable to do so in consequence of a strike.

The terms of the charterparty, so far as they are material to the point I have now to decide, are these: It was provided that the *Ashdene*, after being loaded, should proceed to London, either to the Pool, Regent's Canal, Victoria Docks, the Derricks, Beckton, or other safe berth as ordered; eighty-four running hours being allowed on each voyage for loading and discharging, and there was an exception of any delay caused by strikes. The vessel was ordered to the Regent's Canal, and was there prevented from unloading by reason of a strike, which would be covered undoubtedly by the strike clause. A good deal of evidence was given to shew that the strike might have been got over if the defendants had used due diligence to get labourers from elsewhere to unload the ship; but the jury found that the defendants could not by any diligence on their part have improved the situation, either by taking the ship to another place, or by using any reasonable efforts to obtain labourers to discharge her at the Regent's Canal. The only questions, therefore, are whether the defendants were within their rights in ordering the vessel to the Regent's Canal; and then, she having gone there, whether they were not protected by the strike clause. So far as I am aware, there is no case which has hitherto exactly decided the very point in question in this case, although, I think, it has been decided in principle.

The facts with regard to this part of the case were these: The *Ashdene* left the Tyne, under this charter, at 1 o'clock on the morning of February 10. The strike of the coal porters at the Regent's Canal commenced about 12 o'clock on February 10, and it lasted until February 17—that is to say, including the Sunday, seven days. The charterers first became aware of the

strike about 4 o'clock on the afternoon of February 10, when the vessel was on her voyage from the Tyne to the Thames.

The *Ashdene* came in, and was ready to discharge by 2.30 P.M. on February 11. There she was, waiting at the Regent's Canal ready to discharge, and unable to discharge because of the strike, until February 16. Upon that day a great many efforts were made to get over the difficulty, and at 5.15 P.M. a telegram was received by the captain of the *Ashdene* to proceed to Beckton, which was another of the places of discharge mentioned in the charterparty. He went there as speedily as he could, and he got there at 6.30 A.M. on February 18. The discharge was completed by 7.30 P.M. on February 19.

Now, there was some doubt in my mind whether, upon the construction of the charterparty, the defendants had acted reasonably in ordering the ship to the Regent's Canal, when the facts were that before she got to the Regent's Canal a strike existed there to the knowledge of the defendants. Accordingly, to save expense, I asked the jury this question: "1st. Did the defendants act reasonably in ordering the ship to the Regent's Canal?" The jury answered, "Yes," having reference to the order that was sent from London to the Tyne before the ship sailed. But it was further suggested that, although that may have been reasonable, the defendants' representatives in London, when they heard of the strike, ought to have intercepted the vessel at some part of the Thames, and ordered her to some other place, named in the charterparty, where there was no strike. I therefore asked the jury whether, it being reasonable, as they had found, to order the ship to the Regent's Canal, it was reasonable to allow her to continue her course and go there after the defendants' representatives knew of the strike. The jury found that it was not reasonable; and they also found that if the vessel had been stopped at Gravesend, and ordered to some other place of discharge named in the charterparty, she could have been discharged within the period allowed by the charterparty; but that if she was not stopped at Gravesend, and was once allowed to go to the Regent's Canal, she could not have been so discharged within the time. Therefore, that raises the question very clearly and neatly whether it was within the right of the

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defendants, upon the true construction of this charterparty, to order the *Ashdene* to the Regent's Canal, and to leave that order undisturbed, although before she got there the strike had commenced.

There were five different places to which the defendants might have ordered this vessel. In point of fact they ordered her to the Regent's Canal because they were carrying out a sale of coal to one of the London Gas Companies, and that gas company required the coal near to the Regent's Canal; therefore it was a matter of importance to them that she should go there, and when it was suggested that the vessel might have gone to the Victoria Dock, or the Derricks, or the Pool, or that she might have gone in the first instance to Beckton, the answer of the defendants was that these clauses were introduced for their benefit, and that they had a right to order her to any one of the places mentioned in the charterparty.

The strike was very sudden and unexpected, and again, no one could tell at what period the strike would be over. It might have happened, if they had shifted the vessel's course and sent her to some other place, that the strike might have come to an end at the Regent's Canal and commenced at that other place. But that becomes immaterial, inasmuch as the question, to my mind, turns on the real rights of the parties under the charterparty, and not on the question whether it was reasonable or unreasonable to send the vessel to the Regent's Canal. I have said why she went there, but it is right that I should observe that the contract whereby she might be ordered to the Regent's Canal, if the defendants so desired, of course had nothing to do with, and could not be affected by, any contract which the defendants had made with third parties. Of course it is easy to see why she was wanted, having a cargo of coal on board, to be near the Gas Company's works, but that could not be set up as against the plaintiffs' rights. What I have now to consider is: what was the contract between the parties; and the conclusion to which I have come is that the option created by the charterparty is created for the benefit of the defendants, and that the defendants have a right to act on it. Even although it turns out that, when the vessel arrived at the port to which she

was ordered, there was a strike of workmen there, the plaintiffs are not entitled to say to the defendant, because there was a strike there you ought not to have allowed the vessel to go there because it was not reasonable to do so. It is not a question between the plaintiffs and the defendants as to what is reasonable or unreasonable, it is a question of contract between the parties.

Now it is somewhat singular that a case which was cited by the plaintiffs' counsel for the purpose of calling my attention to the dictum of Bowen, L.J., is the very case that most strongly shews that the view that I have taken of this charterparty is the correct view. The case is that of the *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.* (1) Bowen, L.J., there says: "Then we are told that an option is given to the charterer, and that it was not properly exercised unless a berth was chosen that was empty"—the question there being not one of strike, but whether there was room or not in the berth that was chosen. The Lord Justice goes on: "But I think there was confusion in this argument also. The option is given for the person who has to exercise it. He is bound to exercise it in a reasonable time, but is not bound in exercising it to consider the benefit or otherwise of the other party. The option is to choose a port, or berth, or dock—that is, one that is reasonably fit for the purpose of delivery." That is to say, she is to go to a place where she will be safe, and so forth. Then comes an observation which was cited by the learned counsel for the plaintiffs. "It will not do, for instance, to choose a dock the entrance to which is blocked—that would be practically no exercise at all of the option, and I think that is what Lord Blackburn meant in *Dahl* v. *Nelson* (2), and follows from the cases he there cited of *Ogden* v. *Graham* (3) and *Samuel* v. *Royal Exchange Association.* (4)" Now, at first sight, that may seem to help the plaintiffs; but when you come to look at what Bowen, L.J., says, it clearly shews that the option is a right given by the shipowners to the charterers, and when he used the words, "It will not do, for instance, to choose a dock the entrance to which is blocked," he meant to say that if it became an absolute physical impossibility for the vessel to go

(1) [1891] 2 Q. B. 647.
(2) 6 App. Cas. 38, at p. 44.
(3) 1 B. & S. 773.
(4) 8 B. & C. 119.

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there—for instance, if there had been an earthquake, so that the mouth of the port was destroyed, and there was a sort of ademption of that port from the ports named in the charterparty—that reasoning would apply. It is obvious that that is what the learned Lord Justice meant when you look at the cases he referred to, and at the observations of Lord Blackburn in *Dahl* v. *Nelson*. (1) Those are cases in which the port was for all purposes, so to speak, an impossible port. In the present case, so far from this being an impossible port, it was the port not only contemplated in the first instance by the parties, but it was a safe port, and there was nothing, except the strike, to prevent the vessel from going there, and discharging as quickly and as safely as possible, and that strike was provided for by the language used in the charterparty itself for the benefit of the defendants. Therefore, the conclusion I come to in this case is, that the defendants were within their rights in sending the vessel to that port, and that, notwithstanding the finding of the jury on the question left to them, there ought to be judgment for the defendants.

Judgment for Defendants.

A. P. P. K.

The plaintiffs appealed.

1893. Nov. 8. *Bucknill, Q.C.*, and *Scrutton*, for the plaintiffs, in support of the appeal. The option to be exercised by the charterers is subject to limitations. One is that it must be exercised within a reasonable time, but further there is an implied obligation to choose a berth which, in the words of Bowen, L.J., in *Tharsis Sulphur and Copper Company* v. *Morel Brothers & Co.* (2), is "free or likely to be so in a reasonable time," that is, he must choose a berth at which the commercial adventure can be carried out, and ought not to send the ship to any place where there is a strike. A safe berth is one to which the ship can not only go safely, but where she can discharge safely. The wording of the strike clause shews that it applies only to a strike breaking out after the arrival of the ship, and prolonging the time for unloading. [They cited *Ogden* v. *Graham* (3), and *Dahl* v. *Nelson*. (1)]

(1) 6 App. Cas. 38. (2) [1891] 2 Q. B. 647.

(3) 1 B. & S. 773.

Bigham, Q.C., and *Leck*, for the defendants, were not called on.

LORD ESHER, M.R. This is as clear a case as can be. The question is whether the defendants did anything more than they were, by the terms of the charterparty, entitled to do in ordering the vessel to the Regent's Canal. The shipowner undertook that the vessel should proceed to London, either to the Pool, Regent's Canal, Victoria Docks, the Derricks, Beckton, or other safe berth as ordered. There is nothing from which any limitation can be implied on the power of the charterer as to the choice of the place to which the ship should go, unless perhaps there is an implied limitation in case something arises which makes the Regent's Canal one to which a ship of this kind cannot go, as, for instance, if the entrance were blocked. At the time when the charterers ordered the ship to the Regent's Canal there could be no objection to such an order, and there was nothing which happened afterwards to oblige the charterers to alter their order. It is true that when the vessel arrived at the Regent's Canal there was a difficulty in taking delivery because of a strike of workmen; but a strike would in itself not be sufficient to exonerate the charterers from doing the best they could to accept delivery, and would not entitle them to fold their arms and do nothing. If, notwithstanding the strike, they could by reasonable exertion have taken delivery of the cargo within the proper time, the strike would not have afforded them any defence. But the jury have found that they could not, by any reasonable effort, have taken delivery. The delay, therefore, was caused entirely by the strike, and was within the exception in the charterparty. The judgment appealed against was right, and the appeal must be dismissed.

LOPES, L.J. I also think this a very clear case, and I agree with the judgment of the Master of the Rolls.

KAY, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Lowless & Co.*

A. M.

1893
Oct. 26.

CHAFFERS *v.* GOLDSMID.

Parliament—Petition—Refusal of Member to Present Petition—Right of Action.

There is no right in a person desirous of petitioning the House of Commons to compel any particular member of the House to present such petition, and no action will lie against any member of the House for refusing to present such a petition.

APPEAL of the plaintiff from a decision of Collins, J., at chambers, affirming an order of a master by which the plaintiff's statement of claim was struck out as frivolous.

The statement of claim alleged that the plaintiff, as a natural born British subject, was entitled to exercise the right and franchise of petitioning Parliament, and was also on the register of electors for the constituency of the southern division of St. Pancras; that the defendant was the member for that division, and was the representative of the plaintiff in Parliament, and as such was bound and compelled both by the common law and the law of Parliament to present any proper petition to the House of Commons for redress of any grievance beyond the jurisdiction of the common law from which he might be suffering, provided such petition was not in violation of and did not transgress any rule of the House of Commons; that the plaintiff on February 17, 1893, requested the defendant to present his petition to the House of Commons for redress of certain grievances beyond the jurisdiction of the common law from which he was suffering, but the defendant improperly and maliciously refused to present the said petition, whereby the plaintiff had been deprived of his right and franchise to have the said petition presented. The plaintiff claimed 500*l.* damages, and also a writ of mandamus, commanding the defendant to present his petition to the House of Commons, containing grave charges against one of Her Majesty's judges, and praying that an address might be presented by the House to Her Majesty that she would be pleased to remove him from his office.

From the affidavits filed upon the application, it appeared that in the parliamentary session of 1891 the plaintiff requested

the defendant to present to the House of Commons a petition in which he charged one of Her Majesty's judges with gross abuse of his judicial office, and prayed for an inquiry into the truth of the charges in the petition. The petition was presented by the defendant, but was subsequently returned to him by the clerk to the select committee on public petitions, with an intimation that it was not a proper petition to present, and could not be received. The petition was returned by the defendant to the plaintiff, who brought an action against him in the Westminster County Court, in which judgment was given for the defendant, on the ground that he had taken all proper steps with a view to presenting the petition. In February, 1892, the plaintiff forwarded to the defendant another petition for presentation, which was practically identical with the former one, and was returned by the defendant to the plaintiff. On May 3, 1892, the same petition was again forwarded by the plaintiff to the defendant, who duly presented it; it was returned by the clerk to the committee with an intimation that it was not one that should be presented to the House. On February 17, 1893, the plaintiff forwarded to the defendant another petition for presentation in similar terms to the former petitions, except as to the prayer, which asked that an address might be presented to Her Majesty, praying for the removal of the judge from his office. The defendant, considering this petition to be practically identical with those which had been refused by the committee, declined to present it, and again declined to do so after his attention had been called by the plaintiff to the difference in the prayer. (1)

The plaintiff in person. The right of petitioning Parliament for a redress of grievances is a fundamental principle of the constitution, and a petitioner has a right to have a petition presented to the House of Commons so long as it is couched in temperate and respectful language, and is in other repects in accordance with the rules of the House. It is admitted that the

(1) It appeared from the affidavits that other members of Parliament had declined to present petitions on the same subject forwarded to them by the plaintiff for presentation.

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original petition was wrong in point of form, since it prayed for an inquiry which the House had no power to grant, but the last petition was strictly in accordance with the rules. There being a right to petition, and the only way of bringing the petition before the House being by means of its presentation by a member, there is a duty in a member to present the petition, and for breach of such duty an action will lie. The right of action for a malicious refusal to permit a man to exercise an unquestionable legal right which he enjoys in common with the rest of the public is clearly laid down in *Ashby* v. *White*. (1) In such a case as the present there is no redress except by means of a petition to Parliament, as there is no right of action against the judge at common law or otherwise. [He also cited Erskine May's Parliamentary Practice, 10th ed. p. 493; Hansard (3rd Series), vol. 223, p. 989.]

Channell, Q.C. (*Cagney*, with him), for the defendant. There is admittedly a right in every person having a grievance to have a particular petition presented to Parliament, if it is in accordance with the rules laid down as to petitions; but there is no duty in any individual member of Parliament to present any particular petition. There is no authority to shew that such an action as the present one will lie. The proper course has been adopted in having the statement of claim struck out as frivolous and vexatious, for it is clearly demurrable, unless it is aided by the allegation of malice; and even such an allegation would not be sufficient to prevent the action being stayed, if without it it would not be sustainable: *Dawkins* v. *Saxe Weimar*. (2) It is a reasonable inference from the evidence in the present case that the petition was not a proper one to present, and it must be remembered that this is not the first action brought by the plaintiff against the defendant for the non-presentation of similar petitions.

The plaintiff, in reply.

WILLS, J. I am of opinion that the decision of the learned judge at chambers was right, and that this appeal must be dismissed. The action is one for which there is no precedent, and

(1) 2 Ld. Raym. 938. (2) 1 Q. B. D. 499.

that is a fact of importance when we are considering whether the action will lie. I do not desire to say a word which is not strictly in accordance with the decision in *Ashby* v. *White* (1), a case which forms a great landmark in legal history, and which called attention to the fact that, wherever a common law right, which is also a public right, is violated, an action lies at the suit of the sufferer. All doubt as to the legal principle was laid at rest by that decision; the principle there laid down has been acted upon ever since, and it is impossible to disregard the fact that conduct which since that decision was given must have occurred hundreds of times has never been called in question. It has never been suggested that there is a common law right on the part of every constituent to have his petition presented to the House of Commons by the member for the division or place for which he is entitled to vote, and that alone is a very strong argument against the existence of any such right. There is no trace of it to be found beyond the general statement that it is the right of the subject to petition Parliament; of that there is no doubt; but it by no means follows that an action lies against a particular member for declining to present a petition. I cannot conceive that in this respect there is a greater duty imposed on the member for the particular constituency to which the person desiring to petition belongs than upon any other member of Parliament; if there is any right to compel the presentation of a petition it must be a right as to all members generally, and not a right specially affecting the member for the particular constituency of which the petitioner is an elector. If such a right existed, I cannot believe that in a period of nearly 200 years, during which the principle laid down in *Ashby* v. *White* (1) has been steadily acted upon, no trace of its assertion could be found.

These considerations would be sufficient to dispose of this appeal, but it is desirable that we should notice the other point raised by Mr. Channell. It may arise either upon an application to the inherent jurisdiction of the Court to prevent an abuse of its process, or upon an application made under the rule as to striking out pleadings as frivolous and vexatious, and it

(1) 2 Ld. Raym. 938.

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Wills, J.

has an additional force if an application is being made to the Court's inherent jurisdiction. On such an application we are at liberty to listen to affidavits, and from those used in the present case it appears that two petitions, not identical indeed with the present petition, but identical as to everything except the relief asked, had been rejected by the committee of public petitions as not proper to be presented to the House; thereupon this petition was sent for presentation, differing from the others only in that it asks the House to vote an address for the removal of a judge, instead of asking for an inquiry. If the other petitions had been objectionable, the defendant would naturally suppose that a petition setting out the same facts, and only differing in the nature of the relief asked, was open to the same objection as they were. Acting as he did, on the judgment of the committee of public petitions, how can the defendant's conduct be said to have been malicious? If he made a mistake in applying the committee's decision to a petition somewhat different in form, how can that be said to be malicious? It is clear that the action will not lie for the breach of a common law right, and the charge of malice is conclusively disposed of by the defendant's affidavit, which states temperately the steps taken by him in the matter. It would be to permit an abuse of the process of the Court were we to allow the defendant, under these circumstances, to be harassed by an action which cannot possibly succeed.

GRANTHAM, J. I am of the same opinion. The question which we are deciding is one of great importance: it is whether a constituent has the right to compel his member to present to the House of Commons any petition he wishes, so that an action will lie against the member if he does not present it. I entertain no doubt upon the point; there is no such right in the constituent, and no action will lie against the member for his refusal. A member of parliament is not a member for an individual constituent, he is returned by the constituency and has a duty to discharge to the whole constituency. The right to present a petition is not one which is inherent only in the petitioner's representative; it is one which is more often exercised by members who are not in fact members for the petitioner's con-

stituency; any member may and does present a petition for any one.

In the present case, the plaintiff has made certain remarks as to the right to petition, which I have no desire whatever to gainsay; unquestionably, there is a right to bring the conduct of the judges before Parliament. The question is whether such an action as the present, brought because the defendant thought, in the exercise of his judgment, that this petition ought not to be presented, and certain to involve him in very serious costs if allowed to proceed, is not a frivolous action.

Upon the question of malice, I entirely concur with the remarks of my learned brother. The statement of claim shews that the plaintiff's case is based on the defendant's having acted improperly and maliciously in refusing to present the petition; we have already dealt with the allegation of an improper refusal, and, as regards the charge of acting maliciously, the affidavits shew that there was no malice in fact. It is necessary that the defendant should be allowed great discretion as to the presentation of a petition which other members had already refused to present, and which, if again presented, would be taken off the file, and, in my judgment, he exercised this discretion properly.

Under these circumstances, it is idle to suggest that the action is not frivolous and vexatious.

WILLS, J. I wish to add that, in my opinion, a right of action cannot be extended by alleging that to be done maliciously which, if not so done, would not give a cause of action.

Appeal dismissed.

Plaintiff in person.

Solicitors for defendant: *Waterhouse, Winterbotham, Harrison, & Harper.*

W. J. B.

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Nov. 1.

SMITH *v.* MÜLLER.

Boiler—"Used exclusively for Domestic Purposes"—Boiler Explosions Act, 1882 (45 & 46 *Vict. c.* 22), *s.* 4—*Boiler Explosions Act*, 1890 (53 & 54 *Vict. c.* 35), *s.* 2.

A boiler used to heat offices or business premises upon which the owner does not reside, and also to supply warm water for the purpose of cleaning the offices and for the household purposes of a resident caretaker, is within the exception in s. 4 of the Boiler Explosions Act, 1882, and s. 2 of the Boiler Explosions Act, 1890, which except from the operation of those Acts boilers "used exclusively for domestic purposes."

CASE stated by the stipendiary magistrate for Birmingham.

The respondent had been summoned to answer an information by the appellant on behalf of the Board of Trade, charging that he did unlawfully make default in complying with the requirements of s. 5 of the Boiler Explosions Act, 1882, by failing, within twenty four hours of the occurrence of an explosion to a boiler of which he was the owner, to send notice thereof to the Board of Trade, contrary to the said Act.

By s. 3 of that Act "boiler" is defined, and it was admitted that the respondent's boiler was a boiler within the meaning of that section.

By s. 4 the Act is not to apply (inter alia) to any boiler used exclusively for domestic purposes.

By s. 5, sub-s. 1, on the occurrence of an explosion from any boiler to which the Act applies, notice thereof is within twenty-four hours thereafter to be sent to the Board of Trade by the owner or user or by the person acting on behalf of the owner or user. Sub-s. 3 imposes a penalty not exceeding 20*l.* if default is made.

By s. 6 the Board of Trade is empowered, on receiving notice of a boiler explosion, to hold a preliminary inquiry or a formal investigation, or both.

The Boiler Explosions Act, 1890 (53 & 54 Vict. c. 35), s. 2, while extending the operation of the Boiler Explosions Act, 1882, to other classes of boilers which had been by s. 4 of the latter Act excluded from its operation, continues the exemption therein contained in favour of boilers used in the service of Her Majesty or used exclusively for domestic purposes.

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The following facts were admitted by the parties. The respondent carried on business as a merchant at Birmingham, and on December 28, 1892, an explosion occurred to a boiler on his premises and owned by him; it caused but little damage, and resulted in no loss of life or injury to the person. The boiler was used for circulating hot water through a range of piping which warmed the clerks' office only. The office was used by the respondent's clerks for the purposes of his business, and was occupied by three clerks. The respondent did not reside upon the premises, which were used as his place of business, and were the only place where his business was carried on. There was also a tap fixed in the boiler itself by which warm water was drawn off for cleaning the offices, and for the household purposes of the caretaker and his family, who resided upon the premises, the boiler and apparatus being under the caretaker's control. The boiler was not used to generate steam power for any machinery, there being no machinery on the premises, but was used only for the purposes above mentioned. When it was put in, it was purposely so placed to be convenient for the caretaker and his family to draw water from it for their household purposes. It was constantly so used in the summer time when it was not used for heating the pipes in the office. The water supplied to the boiler was charged in the usual way by water-rate assessed on the annual value of the premises, and not by meter as for trade purposes. No notice of the explosion was given to the Board of Trade, as pointed out by s. 5 of the Boiler Explosions Act, 1882.

The appellant contended that the boiler was a boiler within the meaning of s. 3 of the Boiler Explosions Act, 1882; that it was not used exclusively for domestic purposes within the meaning of s. 4 of that Act, and that the term "domestic purposes" did not include purposes connected with business purposes.

The respondent contended (inter alia) (1.) that the language of s. 4 exempting "boilers used exclusively for domestic purposes" shewed that the proper criterion of exemption was to ascertain what the boiler was used for, not what the premises on which it was placed were used for; (2.) that the use of a boiler to feed hot water pipes to warm a room in which clerks were

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employed for business purposes was none the less a "domestic purpose" because the clerks while being warmed were attending to business; (3.) that the phrase "domestic purposes" was not to be read as equivalent to "domestic purposes in private houses," but was wider in its application; (4.) that as with respect to explosions of boilers within the Act a liability was imposed on the owners not only to submit to a Board of Trade inquiry or formal investigation, but also a liability to pay the costs of such inquiry or investigation, recoverable as penalties, the Acts were penal, and should be construed strictly.

The learned magistrate dismissed the information.

The question for the opinion of the Court was whether the boiler, being a boiler within the meaning of s. 3 of the Act of 1882, was "used exclusively for domestic purposes" within the meaning of s. 4 of that Act.

Sir C. Russell, A.G. (*Henry Sutton*, with him), for the appellant. The learned magistrate was wrong, and should have convicted the respondent. It is not denied that the boiler comes within the definition in s. 3, and the only question is whether it comes within the exception in s. 4. The present exceptions were preserved by the Act of 1890 for a very sufficient reason; boilers used in the service of Her Majesty were presumed to be well taken care of, and those used for domestic purposes were excluded because it was thought that the master of the house would exercise care for the sake of the safety of his family. The size of the boiler is immaterial; the only question is the use to which it is applied; is it a domestic use? In all the definitions of the word "domestic" in the various dictionaries there is a uniform idea of "home"; it means "done at home," "relating or belonging to the home"; the phrase "used for domestic purposes" points therefore to a home use of the boiler, its use at the owner's place of residence, not at his place of business.

[CHARLES, J. Take the case of a boiler supplying water to residential flats, the water being used for such purposes as scrubbing the floors, &c.; would the use of the boiler be any the less a domestic use because it supplied water to many flats?]

It might perhaps be contended that if each tenant supplied

water to his own flat it would be a domestic use, while if the landlord supplied all the flats from one boiler it would not. But it is sufficient to say that in such a case each of the flats would be a residence, a domus; here the premises are merely used for business purposes.

[WRIGHT, J. Would the case of a boiler supplying water to chambers in the Temple, in which there were no residents, be within the Act?]

Yes; and not within the exception, for it would not be used for merely domestic purposes.

[WRIGHT, J. There being no definition of a domestic use in the statute, the question must in each case be one of fact for the magistrate to exercise his common sense on.]

Assuming it to be so, if the view of the magistrate, though a conceivable view, is manifestly wrong, the Court will review it.

Wm. Wills, for the respondent, was not called upon.

CHARLES, J. I am of opinion that our judgment should be for the respondent. The test made applicable by the statute is not the character of the persons using the boiler, nor whether they occupy or reside upon the premises, but the use made of the boiler. In my judgment the learned magistrate was right in finding that the water was used exclusively for domestic purposes. The Attorney-General suggests to us that from the meanings given to the word "domestic" in various dictionaries we ought to hold that this statute has limited the exemption to the use of water by a resident in the proper sense of that term. I think that there is nothing to warrant us in so holding. The case put by my brother Wright as to barrister's chambers is almost decisive of the point; there water may be used for the purposes of heating the rooms, drinking, washing the floors, and other such purposes, which are none the less domestic purposes because the occupier does not sleep there. The test of residence is not applicable; in the case of large establishments great inconvenience might arise from holding that it was. The case has been put in argument of a large pile of buildings in the city used for office purposes only, except that they are looked after by a resident caretaker, and it is said to be difficult to draw the line

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if residence is not the test; the answer is that in these cases the line must be drawn by somebody, and that it is a question of fact for the tribunal before which the case comes whether the boiler is used exclusively for domestic purposes. I think the learned magistrate would have been wrong had he held that an offence had been committed.

WRIGHT, J. I am of the same opinion.

Judgment for respondent.

Solicitor for appellant: *Solicitor to the Board of Trade.*

Solicitors for respondent: *Burton, Yeates, & Hart, for Johnson & Co., Birmingham.*

W. J. B.

C. A.

1893

Nov. 4.

[IN THE COURT OF APPEAL.]

MAYOR, &c., OF SOUTHPORT *v.* ORMSKIRK UNION ASSESSMENT COMMITTEE.

Poor Rate—Occupation—Exclusive Use—Gas Mains.

By s. 43 of the Southport Improvement Act, 1871 (34 & 35 Vict. c. cxl.), the local board of Birkdale had the exclusive right of laying down gas mains and pipes within that township, and were obliged to keep all present and future gas mains and public lamps in good repair, and were to afford the corporation of Southport (who were the owners and occupiers of gas-works, and were empowered by statute to supply gas in the township of Birkdale) the use of the same mains for the supply of gas for public and private purposes within that township, in consideration of certain payments to be made by the corporation to the local board for every thousand cubic feet of gas supplied to private consumers. The local board had laid mains within the township, and had kept them in repair, and had afforded the corporation the use of the same for the supply of gas. The mains were not used for any purpose other than the supply of gas by the corporation. The corporation laid the service pipes from the mains to the premises of private consumers at the cost of the latter, kept the service pipes in repair, and charged and collected all gas rents:—

Held, affirming the decision of the Queen's Bench Division ([1893] 2 Q. B. 468), that the corporation had only a right to the use of the mains for the sole purpose of the supply of gas, and had no exclusive occupation of the mains so as to render them liable to be rated in respect of them.

APPEAL by the above assessment committee against a decision of a Divisional Court (Cave and Wright, JJ.). (1)

(1) [1893] 2 Q. B. 468.

By the special case stated by consent under 12 & 13 Vict. c. 45, s. 11, upon appeal to quarter sessions against a poor-rate, the following facts appeared.

The appellants were the corporation of the borough of Southport in the county of Lancaster, and the respondents were the assessment committee of the Ormskirk Union (which comprised the township of Birkdale) in the same county, and the overseers of the poor of the township of Birkdale. The appellants were the owners and occupiers of gas-works in the borough of Southport, and were empowered by statute to supply gas in the township of Birkdale.

By s. 43 of the Southport Improvement Act, 1871 (34 & 35 Vict. c. cxl.), the local board of the township of Birkdale "shall have the exclusive right, except as hereinafter provided, of laying gas mains and pipes within the township, and shall forever hereafter keep their present and future gas mains and the public lamps in the township in good repair and condition, and shall afford the corporation [of Southport] the use of the same for the supply of gas for public and private purposes within the township, and in consideration thereof the corporation shall pay to the local board $4\frac{1}{2}d.$ for every thousand cubic feet of gas supplied by the corporation to private consumers within the township; and in consideration of the power conferred by this Act upon the corporation to supply gas within the township the corporation shall also pay to the local board $3\frac{1}{2}d.$ for every thousand cubic feet of gas supplied by the corporation within the township to private consumers, such respective payments to be made quarterly."

The local board of Birkdale had accordingly laid gas mains and pipes within the township, and kept them in good repair and condition, and afforded the corporation of Southport the use of the same for the supply of gas within the township, in pursuance of and in accordance with the provisions of the Act. The mains were not in fact used for any purpose other than that for which they are used by the corporation.

By s. 3 of the Southport Improvement Act, 1876 (39 & 40 Vict. c. cxxvii.), it was enacted (inter alia) as follows: "The Gas Works Clauses Act, 1847, and . . . (certain other Acts) are hereby

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incorporated with this Act . . . provided always, that clauses 6 to 12 inclusive of the Gas Works Clauses Act, 1847, shall be put in force within the township of Birkdale by the Birkdale Local Board only, and not by the corporation, and the word 'undertakers' in clauses 6 to 12 and 19 to 29 inclusive of the same Act shall, so far as such clauses affect the township of Birkdale, apply to and mean the Birkdale Local Board, and not the corporation." The corporation had up to the present time made the service connections with the mains, except for the public lamps in the township; they provided and laid the service pipes from the mains to the premises of the consumers, the cost of such connections and pipes being paid by the consumers, and the corporation kept all the service pipes in repair, and also charged and collected all gas rents.

On June 23, 1892, the corporation were assessed and rated as occupiers of the gas mains and pipes in the township of Birkdale.

The assessment committee contended that the corporation were the occupiers of, and were rateable to the poor rate in respect of the gas-mains and pipes in the township of Birkdale; the corporation contended that they were not the occupiers of the mains and pipes, but had a mere easement or right of enjoyment in respect thereof by virtue of their local Act, and that they were not assessable or rateable to the poor rate in respect thereof.

The Divisional Court held that the corporation were not rateable.

The assessment committee appealed.

Poland, Q.C., and *A. T. Lawrence*, for the committee. The corporation are the occupiers of the mains and pipes; they have the exclusive right of using them for the only purpose for which they can be used, viz., sending gas through them. Their right is not a mere easement. The local board are the owners of the pipes, but they are not the occupiers. The fact that they are bound to keep the pipes in repair does not make them the occupiers, any more than a covenant by the lessor of a house that he will keep the house in repair makes him the occupier of the house. The corporation are in effect lessees of the pipes at a rent.

[KAY, L.J., referred to *Metropolitan Ry. Co.* v. *Fowler.* (1)]

In construing the Act regard must be had to the substance of the case: *Reg.* v. *Stevens* (2); *Reg.* v. *East London Waterworks Co.* (3); *Lancashire Telephone Co.* v. *Overseers of Manchester.* (4) In *Metropolitan Ry. Co.* v. *Fowler* (1) the word "easement" was used in one section of the company's special Act in reference to their tunnel, and yet the Court held that the tunnel was a "hereditament" within the meaning of the Land Tax Act.

Leese, Q.C., and *S. T. Evans*, for the corporation, were not heard.

LORD ESHER, M.R. I think this is as clear a case as can well be. The local board of this township of Birkdale have the power and the duty of laying down mains and pipes for the purpose of supplying gas. The board are the sole judges of how and where the pipes are to be laid down. At the moment when the pipes are laid down by them what is their position? Are they not at that moment the statutory owners of the pipes, so that they are their pipes? If they are the statutory owners of the pipes, which they have laid down themselves, and they have not given up their statutory right, what are they but the owners and occupiers of the land which is filled by the pipes? It is like the case of waterworks companies. Those companies have a statutory right to lay down pipes, within certain limits, no doubt, but a right to lay down pipes, if they please. When the pipes are laid down they are theirs, and it has been held that they, being owners of the pipes, are thereby the occupiers of the land filled by the pipes. This was the position of the Birkdale Board, and unless they have given up that position (I do not say possession) they are the occupiers of the land; and, unless they have some answer to the claim, it is they who are liable to be rated in respect of these pipes. About that, however, I give no concluded opinion.

Have the board given up the whole of that right? They have laid down the pipes. They have not given up the possession of the pipes. Upon the true construction of this statute they have

(1) [1893] A. C. 416.
(2) 12 L. T. (N.S.) 491.
(3) 18 Q. B. 705.
(4) 14 Q. B. D. 267.

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Lord Esher, M.R.

not, in my opinion, given up to the corporation the possession of the pipes, so that the corporation can do anything to the pipes. It is said that in practice, when a service-pipe has to be joined on to the main, the corporation have always done it. If the local board chose to say to them, "When you want to perforate the main for the purpose of supplying a house with gas, you must make the perforation under our inspection, or we must do it ourselves," I doubt much whether the corporation would have any right to do otherwise. There is nothing in the Act which gives them the right of perforating the main, supposing they proposed to do it in a way which would make the pipe very difficult indeed to maintain in repair; I apprehend that in that case the local board would be entitled to say, "You must not do it in that way, you must do it in another way which we suggest."

The local board have the power, and it is their duty to lay down gas mains within the township—not in any particular part of the township—but to lay down the gas mains wherever they think it necessary for the purpose of the gas supply. They are to lay down the pipes, and they are to keep them in repair. So far, therefore, they must be in possession of the pipes.

What, then, have they given up? Have they given up the possession of the pipes to the corporation so as to make their possession an "occupation"? The Act says that they "shall afford the corporation the use of the same for the supply of gas for public and private purposes."

We have heard a very ingenious argument to shew that this means they are to give the corporation the occupation of the pipes. In my opinion they have not; they have kept the occupation themselves. They have kept the possession themselves. They have kept everything with regard to the pipes themselves, except that they have entered into a parliamentary obligation to "afford the corporation the use of the same," not for every purpose, but "for the supply of gas for public and private purposes within the township."

I cannot entertain the smallest doubt that, looking at all the authorities, Cave, J., was perfectly right in holding that, in affording the corporation the use of the pipes for a particular

purpose, the board do not give them the occupation of the pipes, and therefore they do not give them the occupation of the land which is filled by the pipes.

In my opinion, the appeal must be dismissed.

KAY, L.J. It is impossible, in my view, to maintain that the corporation who have the use of these pipes—the exclusive use—by sending gas through them, have anything more than an easement, or that the statute intended that they should have anything more than an easement. They are not lessees of the pipes. They have not taken from the owners of the pipes any rights in the pipes themselves, except that they have this exclusive use of the pipes.

I cannot see the least difference between this case and the case (which I put during the argument) of a landowner who, having a drain passing through his land, grants to some one else the exclusive right of sending sewage through that drain; could you call that right anything more than an easement?

Again, I see no difference between the present case and that of a man who has a wire for the transmission of electricity placed upon or within his land, and who grants to another individual, or to a company, the exclusive right of sending electricity through the wire.

It seems to me in any of these cases it would be impossible to say that the person to whom that right was granted, which is strictly in the nature of an easement, could be the "occupier" of the land through which the sewer or the wire, or in the present case the pipes, permanently passed.

In my opinion, the learned judges were quite right in holding that the corporation have not an "occupation" of the land. I think that they have nothing more than an easement, by reason of their having the exclusive use of the pipes which occupy the land.

Appeal dismissed.

Solicitors for appellants: *Rowcliffes, Rawle & Co., for Alfred Dickinson, Ormskirk.*

Solicitors for respondents: *Mellor, Smith, & May, for J. Davies Williams, Southport.*

W. L. C.

C. A.

1893

Nov. 11, 13.

[IN THE COURT OF APPEAL.]

BOWES AND PARTNERS, LIMITED *v.* PRESS.

Master and Servant—Remedies—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90)—*Miner—Trade Union—Refusal to Work—Breach of Contract —Damages.*

At the hearing of a complaint under the Employers and Workmen Act, 1875, by the proprietors of a coal mine against the defendant, one of their workmen, it appeared that the workmen were employed under contracts determinable on fourteen days' notice, and subject to certain regulations under which the employer might dismiss or suspend any workman for disobedience to orders, and the workmen, in descending or ascending the mine in the "cages," were to obey the orders of the banksman. Part of the miners employed at the colliery, including the defendant, were members of a trade-union. The unionists addressed a notice to the complainants that, at the expiration of fourteen days, all non-unionists must descend and ascend the mine by themselves. On the morning of the day on which such notice expired, certain workmen, of whom the defendant was one, were at the pit-mouth for the purpose of going down by the "cage" then in readiness for them. The first to enter the cage was a non-unionist, whereupon the other men, who were unionists, refused to go down with him. The non-unionist then went down alone, and, upon the next cage coming up a few seconds afterwards, the unionists offered to go down; but the under-manager in charge refused to allow them to do so. This occurred on three successive days.

The justices ordered the defendant to pay substantial damages for wrongfully "absenting" himself from the complainants' service, and dismissed a counter-claim by him against them for having wrongfully refused to allow him to follow his lawful employment:—

Held, affirming the determination of the justices, that, under the circumstances, there had been such a breach of contract on the part of the defendant as entitled the complainants to substantial, and not merely to nominal, damages, and that the counter-claim could not be maintained.

APPEAL from the decision of a Divisional Court (Day and Lawrance, JJ.) upon a case stated by justices.

A complaint was preferred by John Bowes and Partners, Limited, a colliery company, against the defendant, under the Employers and Workmen Act, 1875 (1), claiming damages against him for having, on December 20, 21, and 22, 1892, "wrongfully

(1) The Employers and Workmen Act, 1875, s. 3: "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such, the Court may . . . exercise all or any of the following powers—(1.) It may adjust and set off the one against the other all such claims on the part either of the

absented himself from his employers' service." At the hearing the defendant, pursuant to rule 3 of the Employers and Workmen Rules, 1886, made a counter-claim against the complainants for damages for having wrongfully refused to allow him to follow his lawful employment on the three days before mentioned, the damages being his wages for the three days.

The complainants were the owners of the Pontop Colliery, Durham. The colliery was regulated by certain special rules, of which rule 84 was as follows: "Each banksman shall have control of the shaft top, and each onsetter of the shaft bottom, and shall not allow any person to descend or ascend without permission from the proper authority. He shall regulate, subject to any directions of the manager or under-manager, the order in which persons shall enter and leave the cage, and see that the authorized number only descend or ascend at one time, &c." Under rule 127, any workman might be suspended for disobedience to orders; and under rule 128, any workman suspended should not be re-employed until authorized by the manager or under-manager.

Several of the miners employed at the complainants' colliery were members of a trade-union called the Durham Miners' Association. The defendant was one of them, and was employed by the complainants upon the usual condition of fourteen days' notice to terminate the hiring being required on either side. A non-union miner, named Embleton, was also employed at the colliery.

On December 1, 1892, the manager of the colliery received the following notice from the Durham Miners' (Pontop Lodge) Association: "We, the workmen of Pontop Colliery, do hereby give you fourteen days' notice that, after the expiration of this

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employer or of the workman arising out of or incidental to the relation between them as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise."

By s. 4, "a dispute under this Act between an employer and a workman may be heard and determined by a Court of summary jurisdiction, and such Court for the purposes of this Act shall be deemed to be a Court of civil jurisdiction, and in a proceeding in relation to any such dispute the Court may order payment of any sum which it may find to be due as wages or damages or otherwise, and may exercise all or any of the powers by this Act conferred upon a county court."

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notice, all non-unionists must descend and ascend by themselves." The notice was signed by J. H. Thompson, the "miners' secretary," on behalf of the workmen at the Pontop Colliery. That notice expired on December 15, 1892, up to which date the union men had been in the habit of working with Embleton.

From December 15 to 20, Embleton was not at work at the pit; but at 4 A.M. on the latter day, being employed on the foreshift which went down at that hour, he was at the pit's mouth ready to go down with the defendant and other union men also employed on the foreshift, the men in attendance being altogether thirty-two in number. The cage, which was constructed to hold eight men at a time, was then made ready for the men to go down, but no one got into it. After a few seconds Embleton got in, and Thomas Bowes, the under-manager, who was present, then requested the other men to go down; but they all refused to get into the cage. Thereupon the banksman, at Bowes' request, sent Embleton down alone. When the next cage came up, which was after an interval of about ten seconds, the union men offered to get into it; but Bowes told them that, having already refused to go down, they could not now be permitted to do so. The men remained at the pit's mouth from 4 A.M. to 10 A.M., but Bowes refused to allow them to go down. Substantially the same circumstances occurred on the two following days, December 21 and 22.

At the hearing it was agreed that the complaint against the defendant should be a test case, binding several others, and that the damages should be a sum of 5*s.* only on either side. The questions raised were whether the defendant did absent himself from the complainants' service by refusing to descend in the cage as ordered by the under-manager, and whether the complainants had not themselves determined the contract, and so precluded themselves from suing him for damages. The justices were of opinion that the defendant did absent himself, and that the complainants did not determine the contract, and they accordingly ordered him to pay 5*s.* damages and 4*s.* 6*d.* costs on the original claim, and dismissed the counter-claim.

The question for the opinion of the Court was whether the

justices were right in holding that on the three days in question the defendant did absent himself from the complainants' service by refusing to descend the pit in the cage which the under-manager thought proper for him to descend in, and whether the defendant was thereby guilty of breach of contract entitling the complainants to recover damages as aforesaid; or whether the contract was determined by the complainants, and the defendant was entitled to recover damages for the breach thereof. The Divisional Court affirmed the determination of the justices. The defendant appealed.

On the hearing of the appeal the case was treated as amended so as to raise the question whether the damages ought to be substantial or merely nominal, it being admitted that there had been a breach of contract on the part of the men.

Tindal Atkinson, Q.C., and *Atherley Jones*, for the defendant. The question is whether the employers in this case were in a position to recover damages from their workmen.

The defendant might have been wrong in the first instance in refusing to go down in the cage with a non-unionist; but, under the circumstances, whatever damage has been incurred by the complainants has been incurred by their own act in refusing to allow the defendant to go down afterwards, and not by the act of the defendant. No actual damage was sustained, and the complainants had no right to recover anything against the defendant. If there was any "absenting himself from service" on the part of the defendant, it was only during the infinitesimal time—some ten seconds—between the first cage going down and the next coming up. The complainants had no right to keep the defendant in their employ, prevent him from earning his wages, and then sue him for damages.

There is nothing in the Employers and Workmen Act, 1875, about a workman "absenting himself," though the justices, purporting to act under that statute, awarded damages against the defendant for so doing. The word "absenting" does not occur in the statute at all. Sects. 3 and 4, which give the magistrates jurisdiction, relate to any "dispute" between an employer and a workman arising out of or incidental to their relation as

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such, and do not deal with the case of a workman absenting himself.

The mere refusal by a workman to comply with a lawful order is not an "absenting himself" so as to found a claim for damages. Whether there was a breach of contract or not, this is not a case for damages. The refusal in the first instance was, no doubt, a technical breach of contract; but there was no damage, for the next minute the workman says, "I will go and do my work."

Tomlinson v. *Ashworth* (1), cited in the Court below, is a different case to the present. In that case there was a condition of service that if a man absented himself during working hours he forfeited his wages; but there is no such condition here.

[LINDLEY, L.J. By staying at the top of the pit the men are clearly absenting themselves from the place where they ought to be at work. They do not go where they ought to be.]

The claim for damages is founded on the defendant's "absence," not on the refusal to perform his contract.

The defendant's breach of contract does not justify a breach on the part of the complainants. They cannot withhold his wages so long as his contract continues. They had the right to dismiss the defendant, but did not do so. Neither have they terminated the contract. Accordingly, the justices were wrong in dismissing the counter-claim.

Robson, Q.C., and *T. W. Chitty*, for the complainants. The Court must consider, in every such case as this, what the employer can reasonably be called upon to do. An employer is not bound, nor would it be possible for him, to provide continual or numerous opportunities for his workmen, in batches or singly, to go down to their work. It is enough for him to give one reasonable opportunity. It is obvious that the work could not go on on any other terms. Here the employer gave one such opportunity, and could not give more. This inability brings him within the principles applicable to cases of physical obstruction. The onus of shewing that the course adopted by the employer in this case was unreasonable lies entirely upon the workmen, and they have failed to discharge it. It is admitted that there has been a breach of contract on the part of the workmen, and the

(1) 50 J. P. 164.

complainants are consequently entitled to substantial, and not merely to nominal, damages.

Tindal Atkinson, Q.C., in reply.

LINDLEY, L.J. The question before us arises upon a case stated by the magistrates. At our suggestion, the counsel on both sides have agreed to treat the case as amended, so as to raise the real question; and that we shall not be bound by the expression "wrongfully absented himself from his employers' service," which is to be found in the summons: the real question being whether there has been a breach of contract. I attach no importance myself to the particular expression in the summons, although I think the justices did. The facts appear to be as follows: The colliery owners carry on business under contracts with their men, determinable at fourteen days' notice and subject to certain regulations, of which the most important, for the present purpose, appear to be these—that they give to the employers power not only to dismiss the men if they disobey orders, but also to suspend. Rule 84 requires the men in going up or coming down in the cages in the mine to obey all the orders of the banksman, and rules 127 and 128 deal with the suspension and dismissal of workmen. I pass over those rules with these observations.

Now it appears, for reasons which I do not go into, that the men thought it right to send to the colliery owners on December 1, 1892, the following notice. [The Lord Justice read it, and continued:—]

I pause here to ask, What right had the men to send that notice? What right had they to impose that as a condition of their service? It is not in accordance with their contract, neither was it any part of their contract, that they should be at liberty to say what they do say here, that "all non-unionists must descend and ascend by themselves." On the contrary, it is in the very teeth of the contract which embodies the regulations to which I have referred. The men had no right to take that course and to assert the power of dictating to the masters how the men should ascend or descend. However, there is the notice; and accordingly, after the expiration of those fourteen days, some of

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the miners came to the pit, and, there being a non-unionist who got into the cage to go down the pit, they would not go down. Was that in accordance with the contract or not? It was clearly a breach of contract—so clear a breach that even their own counsel could not hope to argue the contrary. The next thing is to consider what is the consequence of that. It does not appear that there was any other non-unionist besides that one who wanted to go down, and the men who had refused to go down with that non-unionist afterwards said, "Now we are ready to go down," but the under-manager declined to allow them to go down, and the same thing happened on three successive days.

The question which then arises is this: Whether the offer of the men to go down under the circumstances, and at the time when they made the offer, has reduced their breach of contract to one which in point of time endured only for a moment or two, so as to entitle the masters to nominal damages only, or whether there is a more serious and continuing breach; in which case it is agreed that the damages shall be 5*s.*, as assessed by the magistrates.

Now, having regard to the fact that this was a preconcerted course of action, it appears to me that the real solution of the problem presented to us is this—that the men did "absent themselves"; not that I attach much importance to that particular expression, but they did refuse to go to their place of work for three days in accordance with the rules and terms of their contract. I think, having regard to the preconcerted notice and the absence of all right on their part to impose those terms, that the true effect of what they did was this—to say, "We will not go to our work according to our contract"; and if so, then it appears to me that the view taken of the damages was quite right.

With respect to the counter-claim, it appears to me to be absolutely unfounded. The counter-claim is based on the theory that there has been some breach of the contract by the masters. The answer to that is, that what they have done is no breach of contract.

The real difficulty is whether, by reason of the men's breach of

covenant, the masters are entitled to merely nominal damages or to substantial damages. For the reasons I have given, I think they are entitled to substantial damages. It appears to me that the men deliberately put themselves in the wrong, and that they continuously and persistently refused to work except upon terms which they had no right to dictate.

A. L. SMITH, L.J. There are two questions arising for determination in this case. The first is whether, upon the facts stated, the men have committed a breach of contract with their masters; in other words, whether they have absented themselves from their work and so broken their contract; and the second, raised by a cross-claim by the men, is whether they can claim damages against the masters on the basis that they have committed a breach of contract with them. Now, the whole of this controversy may be said to commence with a notice which the men sent to the masters on December 1, 1892. On that day the miners' secretary, Mr. J. H. Thompson, sent this notice to the masters. [The Lord Justice read the notice, and continued:—]

There is no pretence that they had any right to send any such notice. The meaning of that notice is this—"We do not intend in the future, after this fourteen days' notice has expired, as long as there is a non-unionist descending or ascending your pit, to obey your lawful orders." There can be no doubt that this is the meaning of it: "As long as you have non-unionists going up and down your shaft, so long will we not obey the orders you are by law entitled to give to us."

That notice having been given on December 1, on December 20 the men, to the number of thirty-two, came to the pit-bank, and then and there had their first engagement with the masters on the morning of that day. It was the men's duty to be there to go down on the 4 A.M. shift, and the cage was ready for eight of them—the cage, as I understand, holding eight at a time. The first cage having a non-unionist in it, the men one and all refused to enter that cage. They carry out distinctly, by their act on December 20, what they have announced to the masters on December 1. Not a man went down. The same thing happened pursuant to the preconcerted action

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on the morning of the 21st, and again on the morning of the 22nd; and now the question is asked, upon this state of facts, "Is there evidence, and proper evidence, to establish that these men absented themselves from their work, or, in other words, refused to obey the lawful orders of their masters?" I myself can answer that only in one way—that they did absent themselves from their work. There is ample evidence to support that. The justices so found, and stated a case for the decision of the Court; and my brothers Day and Lawrance, JJ., have so found, and, in my judgment, their finding is correct.

This being so, the other question which has been raised in the course of the argument does not arise; because, assuming that there is evidence that these workmen did absent themselves from their employers' service, it is agreed that the damages shall be the sum of 5*s.* for the three days over which the controversy arises. Therefore, the question as to what would be the measure of damage if there had been no absenting of themselves from the employers' service, and only a breach of contract continuing for a short period of time, does not arise, and I need not go into it. But I do say that where a person has had a contract broken with him, and he sues for damages, he is only bound to do what is reasonable to mitigate the damages, and he is not bound to do what is unreasonable. I abstain from saying whether it is reasonable or unreasonable, in a case like this, for a master, when there is a pitched battle proceeding between him and his men, to give facilities to the men to go on perpetually breaking the contract, and bring about what they had determined if possible should be attained. I say nothing about that.

I come to the other cause of action—that is, the claim by the men against the masters. The men cannot substantiate any claim against the masters, unless they make out a breach of contract on the part of the masters. What contract have the masters broken? The masters were, I apprehend, bound to provide a cage or cages for the men to go down to their work for this 4 A.M. shift on the mornings of December 20, 21, and 22. The masters did provide such cage or cages, and the men one and all declared that they would carry out their expressed intention—that they would not go down or come up with the non-unionist. What

duty, after such a refusal as that, was there on the masters to provide other cages to accommodate the men without non-unionist men? No duty at all. It is quite true that cages would be going up or down in the course of a few minutes; but there was no obligation on the masters to provide them, and it is impossible, in my judgment, to say that the masters in this case had committed any breach of duty towards the men.

Therefore the action by the men against the masters fails, and they are not entitled to the damages they sue for, namely, the days' wages for December 20, 21, and 22.

DAVEY, L.J. The question upon which our opinion is asked is, whether the magistrates were right in holding that on December 20, 21, and 22, 1892, the defendant did absent himself from his employers' service by refusing to descend the pit in the cage which the complainants' under-manager thought proper for him to descend in; and whether the defendant was thereby guilty of a breach of contract entitling the complainants to recover damages, or whether the contract was determined by the complainants, and the defendant was entitled to recover damages for the breach thereof.

Now it is admitted that there has been a breach of contract, and that the act of the unionists in endeavouring to force their rule upon the masters could not be justified in this Court. But the question which we have to consider is, whether there was, on those three days which I have mentioned, such an absenting of the defendant from his employment as would entitle the employers to substantial damages for such absenting.

Now I must confess that I have found this a question of very great difficulty. It seemed to me at first sight a stretch of language to say that a refusal by the workman at 4 o'clock in the morning to descend in the cage indicated by the under-manager, but followed ten seconds afterwards, when the next cage came up, by a willingness to go down to his work and to do the ordinary daily work, constituted an absenting himself from his employment during the continuance of a shift. But I must also confess that further consideration of the facts of this case, and of the proper inference to be drawn from them, has removed that impression. I agree with Lindley, L.J.,

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that the solution of the problem submitted to us is this—that the whole course of conduct of the defendant was founded, not on a casual refusal to go down in the particular cage, but on a settled policy and a preconcerted course of action—preconcerted, that is, and agreed upon with other members of the trade-union. There was, therefore, during the whole three days a continued refusal to work except upon terms which the defendant had no right to impose upon the complainants; and during the whole of those three days, therefore, he must be taken, in my opinion, to have refused to work in accordance with his contract. Whether that is properly described as "absenting himself" I do not know, but it is substantially the same thing. It is a refusal to work in accordance with the contract: not an absolute refusal to work, but a refusal to work in accordance with the contract. That being so, I am of opinion that we must answer this question by saying that the defendant did "absent himself from his employers' service" in the sense which, as I have said, I put upon these words; and if so, it appears to me that the damages are settled for us. I agree that the point which has been argued with so much ability on both sides, as to whether the damages should be nominal or substantial, does not really arise if we once get to this, that there was a continued refusal to work according to the contract during the three days.

I will not express any opinion upon the nice question as to the exact obligation upon a person who complains of a breach of contract—what he is exactly bound to do in mitigation of damages. I will, however, observe that one cannot help seeing that the mitigation of damages in this case by continuing to employ the men would really have involved allowing them to work on conditions different from those on which they contracted to work.

On the other point, as to the counter-claim, I agree with what has been said by the other members of the Court, and I agree in the result.

Appeal dismissed.

Solicitors: *Crossman & Prichard, for H. Forrest, Durham, and for Cooper & Goodger, Newcastle.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

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Nov. 3, 9, 10, 28.

IN RE THE TITHE ACT, 1891. ROBERTS *v.* POTTS. JONES *v.* COOKE.

Poor-rate—Tithe Rent-charge—Rating of Owner—Arrears of Rates due before passing of Tithe Act, 1891—*Deduction from Tithe Rent-charge accruing after passing of Act—Retrospective effect of Statute—Repeal of Statute —Saving of existing Rights and Liabilities—Tithe Act*, 1891 (54 & 55 *Vict. c.* 8), *s.* 6—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 38.

By s. 6 of the Tithe Act, 1891, "any rate to which tithe rent-charge is subject shall be assessed on and may be recovered from the owner of the tithe rent-charge, ... and so much of any Act as authorizes any rate on tithe rent-charge to be assessed on or recovered from the occupier of any lands out of which the tithe rent-charge issues is hereby repealed."

At the date of the passing of the Act rates upon a tithe rent-charge were due and in arrear, owing to the omission of the overseers to demand payment thereof from the occupiers of the land out of which the tithe rent-charge issued. The tithe rent-charge for the period in respect of which the rates in arrear were due had been paid to the tithe-owner in full. After the passing of the Act, the overseers, purporting to act under s. 8 of the Tithe Act of 1837, demanded payment of the arrears of rates from the occupiers of the land, who paid them, and were allowed the amount thereof by their landlord, the owner of the land, out of the half-year's rent next becoming due. Subsequently thereto a half-year's tithe rent-charge became payable by the landowner. The landowner claimed to deduct therefrom the amount which he had allowed to the occupiers out of their rent in respect of the arrears of rates paid by them:—

Held, by Lord Esher, M.R. and Lopes, L.J. (Kay, L.J., dissenting), that, having regard to the provisions of s. 6 of the Act of 1891, the payment of the arrears of rates by the occupiers was a voluntary payment, and that they were not entitled to deduct the amount so paid from their rent; that consequently the landowner was not entitled to deduct the amount which he had allowed to the occupiers from the tithe rent-charge due by him:

Held, by Kay, L.J., on the construction of s. 6, and at any rate by virtue of s. 38 of the Interpretation Act, 1889, that, as regarded arrears of rates due at the time of the passing of the Act of 1891, the former machinery was still in force, and that consequently the payment by the occupiers was not a voluntary one, and the landowner was entitled to deduct the amount which he had allowed to them out of their rent from the tithe rent-charge due by him to the tithe-owner.

APPEAL against a decision of a Divisional Court (Day and Bruce, JJ.). (1)

In July, 1892, and for some years previous thereto, the

(1) [1893] 2 Q. B. 33.

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Rev. H. W. Jones was the owner of a tithe rent-charge issuing out of lands in the parish of Llanferres, of which lands H. J. Potts was the owner.

On March 26, 1891 (the date of the passing of the Tithe Act, 1891), rates, amounting to 30*l.*, upon the tithe rent-charge were due and in arrear, owing to the omission of the overseers to demand payment of them from the occupiers of the land. The tithe rent-charge, for the period in respect of which the arrears of rates were due, had been paid to the tithe-owner in full.

On June 9, 1892, the overseers, purporting to act under s. 70 of the Tithe Act of 1836 (6 & 7 Wm. 4, c. 71) and s. 8 of the Tithe Act of 1837 (7 Wm. 4 and 1 Vict. c. 69), demanded payment of the arrears of rates from the occupiers, who thereupon paid them and afterwards deducted the amount which they had thus paid from the next half-yearly payment of rent which became due to their landlord, the owner of the land, claiming the right to make the deduction under the above-mentioned sections.

On July 1, 1892, a half-year's tithe rent-charge, amounting to 85*l.* 4*s.* 2*d.*, became payable by the landowner to the tithe-owner. The landowner paid the sum of 55*l.* 4*s.* 2*d.* to the tithe-owner, retaining the balance of 30*l.*, which he claimed to deduct as being the amount which he had allowed to his tenants on account of the rates paid by them. The tithe-owner, by his agent Roberts, thereupon applied to the county court, under s. 2 of the Tithe Act, 1891, for an order for the recovery of the balance of 30*l.* The county court judge dismissed the application. The Divisional Court reversed the decision, and made an order for the recovery of the 30*l.*

The landowner appealed.

Another appeal by another landowner named Cooke against a similar order was heard at the same time.

By s. 70 of the Tithe Commutation Act, 1836 (6 & 7 Wm. 4, c. 71), all rates to which any tithe rent-charge was liable were to be assessed upon the occupier of the lands out of which such rent-charge should issue, and, in case the same should not be sooner paid by the owner of the rent-charge for the time being, might be recovered from such occupier in like manner as any poor-rate assessed on him in respect of such lands; "and any

occupier holding such lands under any landlord, and who shall have paid any such rate in respect of any such rent-charge shall be entitled to deduct the amount thereof from the rent next payable by him to his landlord for the time being, and shall be allowed the same in account with his landlord; and any landlord or owner in possession who shall have paid any such rate, or from whose rent the amount of any such rate in respect of any such rent-charge shall have been so deducted, or who shall have allowed the same in account with any tenant paying the same, shall be entitled to deduct the amount thereof from the rent-charge, or by all other lawful ways and means to recover the same from the owner of the rent-charge, his executors and administrators."

By s. 8 of the Act 7 Wm. 4 and 1 Vict. c. 69, rates on tithe rent-charge might be assessed on the owner of the rent-charge, and the whole or any part thereof might be recovered from any one or more of the occupiers of the lands out of which the rent-charge issued, in case the same should not have been paid by the owner of the rent-charge, in the same manner as poor-rate assessed on an occupier might be recovered, "upon giving to such occupier twenty-one days' notice in writing previous to any one of the half-yearly days of payment of the rent-charge," and the rate-collector's receipt for the payment of rates was to be received in satisfaction of so much of the rent-charge by the owner thereof; but no occupier was to be liable to pay at any one time in respect of such rate any greater sum than the rent-charge payable in respect of the lands occupied by him in the same parish should amount to for the current half-year in which such notice should have been given.

1893. Nov. 3, 9, 10. *McCall, Q.C.*, and *S. T. Evans*, for Cooke; and *Colt Williams*, for Potts. Though s. 70 of the Act of 1836 and s. 8 of the Act of 1837 have been repealed by s. 6 of the Tithe Act, 1891, and also by the Statute Law Revision Act, 1891, yet by s. 38 (1) of the Interpretation Act,

(1) By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (2):—

"Where this Act, or any Act passed after the commencement of this Act, repeals any other enactment, then, unless the contrary intention appears, the repeal shall not

"(*c.*) affect any right, privilege,

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1889, and indeed impliedly by s. 6 of the Act of 1891 itself, as regards rates made before the commencement of the Tithe Act, 1891, the old machinery has been preserved. Sect. 6 provides that rates on tithe rent-charge *shall be* assessed on and may be recovered from the tithe-owner in the same manner as from an occupier, but the language of the section shews that it only extends to future rates. This is made clear by the concluding words of sub-s. 1, which provides that "so much of any Act as authorizes any rate on tithe rent-charge *to be assessed* on or recovered from the occupier of any lands out of which the tithe rent-charge issues is hereby repealed"; which must mean that prior Acts are only repealed so far as they

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obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or"

"(*e.*) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Act had not been passed."

By the Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 6: "(1.) Any rate to which tithe rent-charge is subject shall be assessed on and may be recovered from the owner of the tithe rent-charge, in the like manner and by the like process as on and from any occupying ratepayer; and so much of any Act as authorizes any rate on tithe rent-charge to be assessed on or recovered from the occupier of any lands out of which the tithe rent-charge issues is hereby repealed.

"(2.) If the collector of the rate satisfies the county court that he is unable to recover in manner aforesaid any rate assessed on the owner of any tithe rent-charge, the Court may, after such service on the owners of the tithe rent-charge, and of the lands out of which the tithe rent-charge issues, as may be prescribed, and after hearing such owners, if they appear and desire to be heard, order the owner of the lands to pay such tithe rent-charge to the collector until the amount of the rate, and any costs allowed by the Court, are fully paid; and the order may be executed as if it were an order under this Act for the payment of a sum due on account of the tithe rent-charge.

"(3.) The Court may, if satisfied that the circumstances justify it, make such order as aforesaid in respect of any future rate, either generally or during the time limited by the order."

By the Statute Law Revision Act, 1891 (54 & 55 Vict. c. 67), the enactments described in the schedule thereto, among others, 6 & 7 Wm. 4, c. 71, s. 70, and 7 Wm. 4 and 1 Vict. c. 69, s. 8, are repealed, and it is provided by s. 1: "This Act shall not affect" (inter alia) "any right, title, obligation, or liability already acquired, accrued, or incurred, or any remedy or proceeding in respect thereof."

authorize "rates to be assessed," that is, as regards *future* assessments on the occupiers. Moreover, s. 38 of the Interpretation Act, 1889, applies, and keeps the old machinery alive as regards rates already made. The obligation of the tenants to pay the rates, and that of the tithe-owner to allow deductions in respect of them, had already accrued under the repealed Acts, and there is nothing in the Act of 1891 to shew an intention to interfere with those accrued obligations. And s. 10 of the Act shews that it was only intended to apply to tithe rent-charge and rates in respect of it becoming due and payable after the Act came into operation. The payment of the rates by the occupiers was, therefore, not voluntary, and the landowners were entitled to make the deductions which they have made from the tithe rent-charge.

Channell, Q.C., *Danckwerts*, and *Loehnis*, for the tithe-owner. Before the Act of 1891 an owner of tithe rent-charge could have been compelled to pay rates upon it only if he had received his tithe rent-charge. *Lamplugh* v. *Norton* (1) shews that the only mode of compelling payment of poor-rates which had been assessed on the owner of the tithe rent-charge was by levying on the goods of the occupier; so that if the owner had not got his tithe the only mode of compelling payment of the rates in respect of it was by distraining on the occupier, who then treated the distress as part payment of the tithe. The effect of s. 8 of the Act of 1837 was, that part of the tithe was intercepted before reaching the hands of the tithe-owner, who did not pay rates unless he got his tithe. The Act of 1891 alters the mode of recovery, and places the liability to pay tithe rent-charge on the landowner, and to such a state of things the old machinery is inapplicable, for it was devised because the occupier was then liable to pay the tithe rent-charge. The notices from the overseers might have been treated by the occupiers as waste paper, because they were no longer under any liability to pay tithe rent-charge. Sect. 6 of the Act of 1891 applies to past as well as to future rates; the expression "to be assessed on" means as under s. 70 of the Act of 1836, and "recovered from" refers to s. 8 of the Act of 1837. The payments by the occupiers were voluntary payments, and

(1) 22 Q. B. D. 452.

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the landlord was not bound to allow them out of his rent, and he is, therefore, not entitled to deduct the amount from the tithe rent-charge. Sect. 8 of the Act of 1837 in effect repealed s. 71 of the Act of 1836; and it has been held that the only mode of recovering the rate was that given by the Act of 1837: *Lamplugh* v. *Norton*. (1) That mode was substantially a machinery for intercepting a certain proportion of the tithe rent-charge in the hands of the occupier before it reached the tithe-owner. The occupier first paid part of the tithe rent-charge to the rate-collector, and then paid the balance to the tithe-owner. The rates were collected by collecting an equivalent part of the tithe rent-charge. Now, by the Tithe Act, 1891, the whole of that machinery is necessarily swept away; and the true construction of s. 6 is that it expressly, or, at any rate, impliedly, repeals that machinery with regard to arrears of rates as well as to future rates. The machinery was based on the liability of the occupier to distress for tithe rent-charge. That liability is taken away by the Act of 1891, and the landlord is now alone liable for tithe rent-charge. Having regard to the circumstances under which, and the objects with which, the Act of 1891 was passed, it never could have been intended that the liability of the occupier to be distrained upon should continue after the passing of the Act as to arrears of rates. Sect. 38 of the Interpretation Act, 1889, does not apply: first, because the occupier was not liable to distress for the rate unless and until he had received a notice under s. 8 of the Act of 1837. Therefore, there was in the present case no existing liability or right to be preserved by s. 38. Secondly, because the liability of the occupier to distress for the rate is altogether taken away by s. 6 of the Act of 1891. It depended on the liability to distress for the rent-charge, and that is gone. Sect. 38 says, "Unless a contrary intention appears"; and here a contrary intention does appear. Apart from the Act of 1891, the landlord not being liable under the previous legislation to pay these arrears of rates, his allowance of them to the occupiers was voluntary, and he is, therefore, not entitled to make the deduction which he claims.

[KAY, L.J. If your argument is well founded, it seems to

(1) 22 Q. B. D. 452.

follow that there is now no mode of recovering these arrears of rates.]

That is so. The old machinery is no longer applicable, because the incidence of tithe rent-charge has been altered. The right to deduct given by s. 8 of the Act of 1837 could be put in force only during the current half-year: *Andrew* v. *Hancock* (1); *Dawes* v. *Thomas*. (2) The overseers must give the notice to the occupier at the earliest opportunity.

McCall, Q.C., in reply. The Act of 1891 was intended to alter only the procedure for collecting tithe rent-charge, not to shift the burden of the rate from the owner of the rent-charge. If the occupier had paid the rate first before the passing of the Act of 1891, it could not have been intended that he should have to bear it. The old procedure remains as regards arrears due before the passing of the Act of 1891.

Cur. adv. vult.

Nov. 28. Lopes, L.J., read the following judgment of himself and Lord Esher, M.R. The Rev. H. W. Jones is the owner of a tithe rent-charge issuing out of lands of which H. J. Potts, the respondent in the Divisional Court, is the owner. On March 26, 1891, the Tithe Act, 1891, received the Royal assent. At that time certain rates upon the said tithe rent-charge to the amount of 30*l.* were due and in arrear, owing to the omission of the overseers to demand payment of them from the occupiers of the land. The tithe rent-charge in respect of which these rates were due had been paid to Mr. Jones in full. On June 9, 1892, the overseers, purporting to act under s. 70 of the Tithe Act, 1836, and s. 8 of the Tithe Act, 1837, demanded payment of these rates from the occupiers, who paid them and deducted the amount thereof from the next half-year's rent which became due to their landlord, the respondent, claiming to do so under the last-mentioned sections. On July 1, 1892, a half-year's tithe rent-charge, amounting to 85*l.* 4*s.* 2*d.*, became payable by the respondent to Mr. Jones. The respondent paid the sum of 55*l.* 4*s.* 2*d.*, but claimed to deduct the balance of 30*l.* as being the sum allowed by him to his tenants on account of the rates paid by them. Mr. Jones

(1) 1 B. & B. 37. (2) [1892] 1 Q. B. 414.

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thereupon applied by his agent to the county court, under s. 2 of the Tithe Act, 1891, for an order for the recovery of 30*l.* This application the county court judge dismissed. On appeal to the Divisional Court the judgment of the county court judge was reversed. It becomes necessary to consider what the law was previously to 1891. Prior to the Tithe Act, 1891, the law was that rates on tithe rent-charge might be recovered from the occupiers of the lands, who were entitled to deduct the amount from the next rent due to their landlord, who in turn could deduct it from the next payment due from him to the owner of the rent-charge (6 & 7 Wm. 4, c. 71, s. 70, and 7 Wm. 4 and 1 Vict. c. 69, s. 8); but under s. 8 of the last-mentioned Act there was a condition attached to the recovery from the occupiers—viz., the giving twenty-one days' notice to them in writing previous to any one of the half-yearly days of payment of the rent-charge. If, therefore, the Tithe Act of 1891 had not been passed, and had not come into operation on March 26, 1891, it is clear that the respondent would be entitled to make this deduction. It would then have been a payment which he was compellable to allow to his tenants. If, on the other hand, it was a voluntary payment by the respondent to his tenants—one which he was not compelled to make—he would not be entitled to make the deduction, but would be bound to pay the tithe rent-charge in full to the tithe-owner. Whether it was a compulsory or a voluntary payment depends on the construction to be placed on s. 6 of the Tithe Act of 1891. That Act altered the procedure for the recovery of rates on tithe rent-charge. They are now, by s. 6 of the Act, recoverable only from the owner of the tithe rent-charge, and then the section proceeds to say, "and so much of any Act as authorizes any rate on tithe rent-charge to be assessed on or recovered from the occupier of any lands out of which the tithe rent-charge issues is hereby repealed." The overseers in the present case neglected to put in force the procedure against the occupiers until after the passing of the Tithe Act, 1891. The question is, whether the old procedure was not then abolished. We think it was the intention of the legislature to create a new machinery for the recovery of tithe rent-charges and of the rates assessed on them, and on and from March 26, 1891, to abolish

the old and then existing machinery. We can read the concluding part of s. 6 of the Tithe Act, 1891, in no other way, and we think we should be defeating the intention of the legislature if we gave effect to the contention of the respondent. It was contended that, notwithstanding the provisions of s. 6 of the Tithe Act, 1891, repealing so much of any Act as authorizes any rate on tithe rent-charge to be assessed on or recovered from the occupier, the repealed Act must be taken, by virtue of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), to be kept alive so far as is necessary to preserve existing rights. Section 38, sub-s. 2, is relied on. It says: "Where this Act, or any Act passed after the commencement of this Act, repeals any other enactment, then, unless the contrary intention appears, the repeal shall not (amongst other things)—(*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed." We should doubt if the general provisions of the Interpretation Act could override the special provisions of the Act of 1891. But, assuming this, the provisions of the Interpretation Act do not cover this case. Under the law as it existed before 1891 there was no right on the part of the occupier to deduct the rates from his rent, or on the part of the landlord to deduct them from payments due by him to the owner of the rent-charge, until certain events had happened. In the present case until the required notices had been given there was no right on the part of the occupiers to deduct the rates which they had paid from payments due by them to the landlord or any one else. As no notice was given to the occupiers until long after the passing of the Act of 1891, there was no existing right to be preserved by the saving clause in the Interpretation Act. We are of opinion, therefore, that the judgment of the Court below is right and should be affirmed, and that the appeal should be dismissed with costs.

Kay, L.J. The question raised by this appeal is, whether, after the Tithe Act, 1891, a notice to an occupier of land, to found proceedings of distress, can validly be given requiring him to pay arrears of rates upon tithe rent-charge, which were made before that statute. In other words, has the right to give such a

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notice, and afterwards to recover such arrears from the occupier, been taken away by the statute of 1891?

The question is a very serious one, if it be the case, as has been argued, that, unless this can be done, such arrears are irrecoverable.

It is a canon of construction of Acts of Parliament that they are not to have a retrospective effect unless that is clearly expressed: Nova constitutio futuris formam imponere debet, non præteritis. Moreover, the General Interpretation Act, 1889, provides, by s. 38, that where any Act passed after its commencement "repeals any other enactment, then, unless the contrary intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued, or incurred under any enactment so repealed, or affect any investigation, legal proceeding, or remedy, in respect of any such right, privilege, obligation, liability . . . as aforesaid, and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced . . . as if the repealing Act had not been passed."

If the power to give notice to the occupier to pay the rate, which is a condition precedent before he can be distrained upon for it, was a "right," or the institution of a "legal proceeding or remedy," and the liability to receive such a notice was a "liability" within the meaning of this statute, such right, remedy, and liability were expressly reserved, even if the statutes under which they were exerciseable were repealed.

In its shortest form the question to be decided is, Were these respectively a "right, remedy, or liability" within the meaning of this reservation?

The history of the legislation on this subject is as follows: In 1836 was passed the Act 6 & 7 Wm. 4, c. 71, for the commutation of tithes in England and Wales. It discharged land from the payment of tithes, and substituted a rent-charge "issuing out of the lands charged therewith" (s. 67), and the rent-charge was, by s. 69, to be subject to rates, in like manner as the tithe commuted for it. Sect. 70 provided that all rates to which the rent-charge was liable should be assessed "upon the occupier of the lands out of which such rent-charge shall issue, and, in case the same shall not be sooner paid by the owner of the rent-

charge for the time being, may be recovered from such occupier in like manner as any poor-rate assessed on him in respect of such lands." The occupier, having paid the rate, might deduct it from the rent next payable to his landlord, and the landlord might then deduct the amount from the rent-charge, "or by all other lawful ways and means recover the same from the owner of the rent-charge." Sect. 80 enabled any tenant who had paid the rent-charge, not being bound to do so as between himself and his landlord, to deduct the amount from his rent. The owner of the rent-charge was to pay the rate, and this was merely machinery to recover it. However, it was found inconvenient to assess the occupier. That involved splitting up the rate upon the rent-charge into as many portions as the number of occupiers who had to pay the tithe rent-charge. Accordingly, in 1837, a further Act was passed (7 Wm. 4 and 1 Vict. c. 69), which, by s. 8, provided that all rates and charges to which the rent-charge was liable "may be assessed upon the owner of the rent-charge, and the whole or any part thereof may be recovered from any one or more of the occupiers," if not paid by the owner of the rent-charge, "upon giving to such occupier twenty-one days' notice in writing previous to any one of the half-yearly days of payment of the rent-charge, and the collector's receipt for the payment of such rates and charges, or of any part thereof, shall be received in satisfaction of so much of the rent-charge by the owner thereof," but no occupier was to be liable to pay at any one time in respect of the rate any greater sum than the rent-charge for the half-year in respect of the lands which he occupied.

This statute does not repeal s. 70 of the prior Act, but, supposing the proceeding under s. 8 to be a complete substitution for all the proceedings in s. 70 of the prior Act, still the occupier paying the rate would get a collector's receipt which the tithe-owner would be obliged to receive in satisfaction of the tithe rent-charge to that amount, and the occupier, where the landlord had to pay the rent-charge, would be entitled to deduct the amount from his rent as a payment which he had been compelled to make for his landlord, and the landlord might then take the receipt and treat it as a satisfaction of so much of the rent-charge as between him and the tithe-owner.

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This, then, was the state of things when the Tithe Act of 1891 was passed. The rate-collector might compel the occupier to pay, by giving him twenty-one days' notice before the day for payment of any half-year's rent-charge. No time was fixed for giving that notice. It might be given at any time, I suppose, within six years after the rate was made. The occupier, paying under compulsion for his landlord, might deduct the amount from his rent, and the landlord, obtaining the collector's receipt, might deduct the amount from the rent-charge.

Then came the Tithe Act, 1891. Sect. 1 made the tithe rent-charge payable by the owner of the lands, notwithstanding any contract to the contrary between him and the occupier. Sect. 6 deals with rates thus: "Any rate to which tithe rent-charge is subject shall be assessed on and may be recovered from the owner of the tithe rent-charge, in the like manner and by the like process as on and from any occupying ratepayer." So far the section only refers to a rate to be assessed in future, and the recovery of such a rate. It continues: "And so much of any Act as authorizes any rate on tithe rent-charge to be assessed on or recovered from the occupier of any lands out of which the tithe rent-charge issues is hereby repealed." "To be assessed" in this part of the section also refers only to a rate made after the Act; but it is argued that the words "or recovered" refer not only to such a future rate, but also to the recovery of a rate made before the Act. I confess I am unable to read these words in that manner. I think that, occurring as they do in a section which refers throughout to a future rate, the "recovery" meant is the recovery of such a future rate. The word "or" is proper, and I think necessary, if that were the meaning. It is a repeal of "so much" of any Act as authorizes the future rate to be assessed "or" which authorizes it to be recovered. But, if there were much more doubt than I think there is as to the meaning, the rule of construction to which I have referred, and the words of s. 38 of the Interpretation Act of 1889, authorize, and I think oblige, the Court to construe s. 6 of the Act of 1891 as referring to rates to be made in future, and not to any rate made before that Act. Moreover, s. 10 of that Act expressly provides that the Act shall extend to tithe rent-charge which first becomes

payable after the passing of the Act, "and shall not extend to sums due on account of tithe rent-charge which were in arrear before the passing of this Act." It is suggested that the rate may come within these words, "due on account of tithe rent-charge."

By the Statute Law Revision Act, 1891, which received the royal assent five months after the Tithe Act, 1891, s. 70 of the Act of 1836 and s. 8 of the Act of 1837 were expressly repealed. This Act contains a saving clause as to any right or liability already acquired, accrued, or incurred, or any remedy or proceeding in respect thereof, in the same terms as those in the Interpretation Act, 1889, to which I have referred. All this legislation shews a most anxious care to prevent such a result as it is argued has occurred in this case, viz., that the arrears of a rate made before the last Tithe Act should become irrecoverable.

In this case a rate was assessed upon the tithe rent-charge under the Act of 1837, before the Tithe Act, 1891, was passed. No proceeding had been taken to recover it. The notice to the occupier had not been given. It was given after the passing of that Act. The occupier paid the rate and deducted the amount from the rent due to his landlord. This action is brought against the landlord, the owner of the land, by the tithe-owner. The landlord relies on the payment of the rate as a satisfaction to that extent of the rent-charge. If the Act of 1837 is still in force as to these arrears of rates, I am of opinion that the defence is a good one. The occupier was obliged to pay the rate, and the collector's receipt was a satisfaction of the tithe rent-charge to that extent. The occupier had a perfect right to hand that receipt to his landlord, on the landlord allowing the amount out of the rent, and the landlord can use the receipt against the tithe-owner as a satisfaction of the rent-charge pro tanto.

Is there any other mode of recovering these arrears? So far as I can see, there is none. Sect. 6 of the Act of 1891 refers only to rates "to be assessed" after the passing of that Act. It is impossible to imagine that the legislature was ignorant that rates on tithe rent-charge were to some extent in arrear—at least, in the principality of Wales—and the choice is between attributing

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an intention to make such rates irrecoverable, or to preserve the operation of the repealed Acts as to them.

I confess I prefer to adopt the latter alternative. The notice to the occupier is part of the proceeding to recover the rate. I think that the right to give such a notice, the remedy or proceeding of which that notice is the commencement, and the liability to receive it, are preserved by the terms of the statute to which I have referred.

I must notice an argument drawn from the supposed intention of the framers of the Act of 1891 to take away all occasion for the unseemly outbreaks of resistance to the law which occurred in Wales when tithe rent-charge, and, I suppose, the rates thereon, were sought to be recovered against the occupier. It is urged that it was the main object of the Act of 1891 to prevent the recurrence of such scenes. The answer is, that, if the legislature meant to prevent this by making rates already assessed on tithe rent-charge already due irrecoverable, they would be deliberately interfering with existing rights in a manner which it is quite impossible for me to suppose they could intend to do.

For these reasons I am of opinion that the landowner's defence is good, and ought to prevail to the extent of the rate which he has paid.

Appeal dismissed.

Solicitors: *Philpot & Son, for Potts & Co., Chester; Marpole & Baker, for Llewellyn Jones, Denbigh; Chappell, Griffith, & Broadbridge, for T. & G. Roberts, Mold.*

W. L. C.

WENDON *v.* LONDON COUNTY COUNCIL.

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Nov. 28.

Metropolis—Management Acts—General Line of Buildings—Building begun before establishment of—Right of Owner to continue without regard to subsequent Building Line—Metropolis Local Management Act, 1862 (25 *& 26 Vict. c.* 102), *s.* 75.

In 1890 the owner of certain land in the Metropolis adjoining a newly laid out street, deposited with the vestry of the parish plans for the erection of a shop on the side of such street, and in the same year in accordance with the plans he constructed the footings for the external walls of two sides of the shop, one side being that adjoining the street, and upon the footings on such side he raised the external wall to a height of twelve feet above the level of the street. He then suspended his building operations. At that date there was no other building on either side of the street. In 1892 he built a row of houses on the same side of the street, but standing ten feet further back from the street than the shop above-mentioned. Subsequently he leased the site of the shop to the appellant, who in January, 1893, without the consent of the London County Council, continued the erection of the shop in accordance with the plans of his lessor. In March, 1893, the superintending architect decided that the general line of buildings in the street was that of the above-mentioned row of houses. The appellant was thereupon summoned for having, contrary to the provisions of s. 75 of the Metropolis Local Management Act, 1862, erected a building beyond the general line of buildings in the street without the consent of the London County Council :—

Held, that the fact that the appellant's lessor had commenced the building prior to the existence of a general building line did not entitle the appellant to continue such building after the general building line was established, and that an order, that the appellant should demolish so much of the building as had been erected by him in advance of the general building line, was rightly made.

Case stated by a metropolitan police magistrate.

Previously to March, 1890, the owner of a piece of land situate in the parish of Fulham, and bounded on the east by a road called Filmer Road and on the west by a road called Munster Road, laid out upon the said land a road for building as a new street called Fernhurst Road, and communicating in a straight line directly between Munster Road and Filmer Road.

In March, 1890, the owner deposited with the vestry of Fulham plans for the erection of a row of shops upon the said land fronting Munster Road and immediately to the north of Fernhurst Road. At the time of such deposit there were no

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buildings in or fronting Fernhurst Road. The site of the southernmost of the said shops was immediately at the junction of Fernhurst Road with Munster Road, and such site was the same as that of the building which was the subject of the complaint hereinafter mentioned.

In August, 1890, the owner commenced to build on the said site in accordance with the plans, and constructed immediately between such site and Munster Road and immediately between such site and Fernhurst Road the footings for the front and flank external walls respectively of the said southernmost shop, and erected upon such footings and immediately abutting on Fernhurst Road the flank wall of the said shop to a distance of thirty feet from Munster Road, and to a height of twelve feet above the level of Fernhurst Road. Having so done, the owner discontinued any further building operations on the said site.

Subsequently to the construction of the said footings and the erection of the said flank wall, namely, in the early part of 1892, the owner erected on the north side of, and fronting towards, Fernhurst Road a number of dwelling-houses, the fronts of which were placed about ten feet further back from the roadway than was the above-mentioned flank wall.

In July, 1892, the owner granted a building lease of the site at the corner of Munster and Fernhurst Roads to the appellant, who purchased from him the said footings and flank wall, and in January, 1893, commenced building operations, utilising for that purpose the said portions of the work which had been built by the owner two and a half years before, with the exception of a chimney breast which had been built in the flank wall and was cut away. The appellant carried up the building to the height of two stories or about twenty-three feet from the level of the ground, and such building projected ten feet in advance of the general line of buildings hereinafter mentioned. The work so executed by the defendant was erected upon the footings and upon and by the side of the flank wall above mentioned. No part of the work was erected in advance of the said flank wall, or further in advance of the general line of buildings hereinafter mentioned than the said flank wall was in advance of such line. The consent in writing of the London County Council had not

been obtained to the erection of the said building by the appellant.

On March 21, 1893, the superintending architect of the said Council decided the general line of buildings on the north side of Fernhurst Road to be the main fronts of the dwelling houses erected thereon as hereinbefore mentioned.

On April 1, 1893, the appellant was summoned before a police magistrate for having unlawfully erected the said building beyond the general line of buildings in Fernhurst Road, without the consent in writing of the London County Council, contrary to the provisions of s. 75 of the Metropolis Local Management Act, 1862.

On behalf of the appellant it was contended that s. 75 of the said Act did not prohibit him from continuing and completing the erection of a building commenced before the existence of any general line of buildings in the road. The magistrate held otherwise, and ordered the appellant to demolish so much of the building as was erected by him beyond the general line of buildings, subject to a case for the opinion of the Court.

R. C. Glen, for the appellant. Sect. 75 does not apply to ground upon which the owner has, at the time of the creation of a general building line, a vested right to build. In *Lord Auckland* v. *Westminster Local Board* (1) it was held that where the plaintiff's houses had been pulled down to facilitate the construction of a railway, the superintending architect could not under s. 75 fix a new general building line without reference to the position of the houses pulled down, so as to prevent the plaintiff from building upon the old sites. If the council wish to make such a new building line they must proceed, not under s. 75 but under s. 74, under which the building owner is entitled to compensation. In the present case the appellant's predecessor had, by constructing his footings and erecting his flank wall before any general building line was established, acquired just as good a vested right to continue that building, at any future time that he thought proper, as Lord Auckland had to rebuild his houses that had been pulled down. But if

(1) Law Rep. 7 Ch. 597.

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his predecessor had such a right, then the appellant must have a similar right; the devolution of title cannot affect the question.

Avory, for the respondents. It is not disputed that the appellant was in the same position as his predecessor; but his predecessor could not have continued his building after the general line was established, even though he had commenced it before, for the continuance of the building was, to the extent to which the building was raised, a fresh erection within the meaning of s. 75. That was decided in *Nathan* v. *Metropolitan Board of Works* (1), where, a house having been commenced to be built

(1) April 3, 1886.

NATHAN *v.* METROPOLITAN BOARD OF WORKS.

CASE stated by metropolitan police magistrate.

In February, 1883, one Tucker, being lessee of a building site on the east side of a street called Lee Road, in the parish of Charlton, commenced to build a row of four houses upon such site fronting Lee Road. At that time there was in existence on the same side of the street and immediately adjoining Tucker's site, a row of ten old houses, the front external walls of which stood much further back from the street than the front external walls of Tucker's houses. In June, 1883, the superintending architect of the respondents, decided the general building line of that side of Lee Road to be that of the ten old houses above mentioned. In November, 1883, Tucker absconded, and his building operations were suspended. At the time of such suspension the external walls of his houses had been run up as far as the first floor. In July, 1884, one Matthews obtained a conveyance to himself of the said building site, and of the unfinished buildings thereon. In June, 1885, the appellant, a builder, under an agreement with Matthews, without obtaining the consent of the Metropolitan Board of Works, completed the said four houses, according to the original plans. In July, 1885, a complaint was made before a metropolitan police magistrate, under s. 75 of the Metropolis Local Management Act, 1862, that the appellant unlawfully erected, or began to erect or raise, the houses in question beyond the general line of buildings without the consent of the board. It was contended on behalf of the appellant that the offence was committed when the buildings were commenced, and that consequently the complaint had not been made within the time limited by s. 11 of 11 & 12 Vict. c. 43. The respondents, on the other hand, contended that the erecting of a building beyond the general building line was a continuing offence, and that, therefore, the limitation section had no application. The magistrate ordered that so much of the buildings as projected beyond the general building line and had been erected by the appellant, should be demolished, subject to a case for the opinion of the Court.

Charles, Q.C., and *Glen*, for the appellant.

Lumley Smith, Q.C., and *Besley*, for the respondents.

THE COURT (Mathew and Smith, JJ.) affirmed the magistrate's order.

Appeal dismissed.

by the appellant's predecessor in title, in front of the general building line, and run up as far as the first floor, more than six months before complaint made, and the appellant having continued the building within six months before complaint, it was held that the original building and the appellant's addition were distinct matters of complaint, and the complaint in respect of the latter being in time, so much as was added by the appellant could be ordered to be pulled down.

[WILLS, J. The Court of Appeal in *London County Council* v. *Cross* (1) seem to have thought otherwise.]

Nathan v. *Metropolitan Board of Works* (2), being unreported, was not cited there.

Glen, in reply. In *Nathan's Case* (2) there was a general building line in existence at the time when the appellant's buildings were commenced, so that their commencement was unlawful, and it may well be that in such a case the subsequent additions to the buildings might be ordered to be pulled down, although by reason of the limitation section in Jervis' Act the original buildings themselves possibly might not. But *Nathan's Case* (2) does not decide that where the appellant's building has been lawfully commenced, any addition to it can be ordered to be pulled down because in the interval a general building line has been created.

WILLS, J. I should be prepared most loyally to follow the decision in *London County Council* v. *Cross* (1), if I were satisfied that it governed the case before me; but I must admit that I am altogether unable to understand the reasoning upon which that decision proceeded, and, so failing to understand it, I am unable to say whether it covers the present case or not. Under those circumstances, I think it the wisest course to look simply at the language of the Act of Parliament and be guided by that. Now, the Act says that "No building, structure, or erection shall, without the consent in writing of the (London County Council), be erected beyond the general line of buildings in any street, . . . such general line of buildings to be decided by the superintending architect, ... and in case any building, structure, or erection

(1) 61 L. J. (M.C.) 160. (2) See preceding page.

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be erected, or be begun to be erected or raised, without such consent," the justices may, on complaint made, order the demolition of any such building or erection. And what is that but saying that the word "erect" in the section is not to be understood in its narrowest sense as confined to the erection of a building in its entirety, but as including any act of raising a building already partially erected. In my opinion every fresh act of raising a building is a fresh erecting. Where, therefore, a building is partially erected before the existence of a general building line, and after such a general building line has come into existence it is further raised in height, if the portions by which it has been so raised project beyond the general building line, the raising of such portions is an offence, and such portions may be ordered to be demolished. Then, in the present case, what had happened was this. The predecessor in title of the appellant had partially built a building outside what has since become the general building line. That portion of the building, having been built at a time when there was no building line, was lawfully built and cannot now be ordered to be pulled down. The present appellant bought the building in that condition and proceeded to raise the walls and build upon them. But, in the mean time, between the original building of the works and the raising of them by the appellant, a general building line came into existence. Under those circumstances, looking at the plain words of the Act, I think that the magistrate was right, and that so much of the building as was raised by the appellant must come down. It may be that this will involve a hardship to the appellant, but that is a matter into which we cannot enter.

WRIGHT, J. In 1890 a new street, called Fernhurst Road, which had then no buildings in it, was laid out for building by the appellant's lessor. At one end of the street the appellant's lessor commenced to build a house, and for that purpose he put in the footings of the walls, and erected the wall on the side next the street to a height of twelve feet above the ground. In so doing he did not establish any building line. He did nothing more till the early part of 1892, when he built a row of houses along the same side of the street, but standing farther back from

the road than the wall of the before-mentioned house. Thereby he created a general line of building where there was none before. Having created that building line, he leased the first-mentioned building site to the appellant, who, in January, 1893, continued the building commenced by his lessor, and raised two stories upon the existing footings and wall. Under those circumstances I think that the act of the appellant in raising the building of his lessor after the building line had been established, was a violation of the statute, and the order of the magistrate must be affirmed.

Appeal dismissed.

Solicitors for appellants: *Newman, Paynter & Co.*
Solicitor for respondents: *Blaxland.*

J. F. C.

TRAVIS *v.* UTTLEY.

1893
Nov. 27;
Dec. 4.

Local Government—"Sewer"—Drain—Drain passing through Private Ground—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 4.

A drain passing through private ground, but receiving the drainage of more than one building, is a "sewer" within the meaning of the Public Health Act, 1875.

CASE stated by justices of Halifax, on the appeal of a sanitary inspector against their decision that a drain running under three houses belonging to the respondent was a "sewer" within the Public Health Act, 1875. The drain in question passed through the basements and received the drainage first of one, and then of the other two houses, which it conveyed into a sewer. It was defective, the result being that sewage leaked into the cellars of two of the houses. The appellant summoned the respondent under s. 91 of the Public Health Act, 1875, and the justices dismissed the summons on the ground that the drain was a "sewer" and vested in the local authority under the Act, and that the respondent was therefore not liable.

Forbes, Q.C., and *Macmorran*, for the appellant. The drain is part of the respondent's land, and it is incredible that the legislature can have intended it to vest in the local authority as

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a sewer. [They referred to *Acton Local Board* v. *Batten* (1); *Meader* v. *West Cowes Local Board* (2); *Ferrand* v. *Hallas Land and Building Co.* (3)]

Tindal Atkinson, Q.C., and *R. Cunningham Glen*, for the respondent. The drain receives the drainage of more than one building, and is therefore plainly a "sewer" within s. 4 of the Act. (4) [They referred to s. 19 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59).]

Cur. adv. vult.

Dec. 5. WILLS, J. Our judgment must be for the respondent. The plans which he submitted to the corporation of Halifax in 1868 shewed a drain running under these three houses, and receiving first the drainage of one, then that of the two others, and carrying it into a sewer. This drain is now out of order and has caused a nuisance, and the respondent contends that it is a sewer, which he, therefore, cannot be called upon to repair. When the houses were built the Public Health Act of 1848 was in force. That of 1875 has since been passed. Both Acts define a "sewer" as including "all sewers and drains except drains used for the drainage of one building only." Words cannot be plainer. This drain is used for the drainage of more than one building. It is therefore a sewer. It is impossible to say that the part which is used for the drainage of one building is a drain, and the rest a sewer. The drain is a sewer from end to end.

In interpreting a statute, the plain meaning of the words can only be departed from when it is repugnant to something in the context, or the rest of the Act. I see no inconsistency

(1) 28 Ch. D. 283.

(2) [1892] 3 Ch. 18.

(3) [1893] 2 Q. B. 135.

(4) By s. 4 of the Public Health Act, 1875 (38 & 39 Vict. c. 55): "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed":

"'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act."

between the definition of a sewer, and the provisions for the regulation of sewers in the Public Health Act, which would justify me in giving the words of the definition any other than their literal construction. If our decision causes, as I fear may be the case, inconvenience and expense to the corporation, the fault is that of their predecessors, who ought to have seen from the plans that the drain would be a sewer. The matter admits of no doubt.

WRIGHT, J. I am of the same opinion. To hold that what is really a private drain vests as a sewer in a local authority is to hold that a local authority can take away part of a man's land in order to perform its functions, and also is liable for the cost of keeping private property in repair—two apparent absurdities. But the language of the section is plain, and the result may have been intended, in order to avoid the difficulty of dealing with the complex effects of the right of several houses to use the same drain. No limitation of the definition of "drain" seems possible. It cannot be said either not to apply to a drain which is part of a house, because a drain like this may run under a long row of houses not held by the same person or under one title; or to apply only to drains which run through land dedicated to public uses, because in many towns the main sewers run under private houses or buildings, and they clearly ought not, for this reason, to be taken out of the control of the local authority.

Judgment for the respondent.

Solicitor for the appellant: *J. R. Hall, for Keighley Walton, Halifax.*

Solicitors for the respondent: *Firth & Co., for Godfrey, Rhodes, & Evans, Halifax.*

H. D. W.

1893
Nov. 9.

MORGAN *v.* BOWLES.

Mayor's Court—Practice—Appeal to High Court—Security for Costs—Claim over 20*l.—Mayor's Court of London Procedure Act*, 1857 (20 *&* 21 *Vict. c. clvii.*), *s.* 8—*Order* LIX., *rr.* 10–17.

The provision of s. 8 of the Mayor's Court Act, 1857, as to the obligation of a party appealing, in an action for the recovery of more than 20*l.*, to give security for costs, is not repealed by Order LIX., rr. 10–17.

APPEAL of the plaintiff from a judgment of the Mayor's Court. The claim was for more than 20*l.*

Lewis Glyn, for the defendant, contended that the appeal could not be heard, on the ground that the plaintiff had not given notice of appeal within two days of the determination, and had not given security for costs, as required by s. 8 of the Mayor's Court of London Procedure Act, 1857. (1)

S. H. Leonard, for the plaintiff, contended that the effect of Order LIX., rr. 10–17, which apply to appeals to the Queen's Bench Division from inferior Courts, was to repeal the section.

CHARLES, J. I am of opinion that the objection must prevail. The procedure on appeals from inferior courts is now regulated by the rules made under the Judicature Acts; but these rules do not alter the conditions under which appeals may be brought, and the provision as to security for costs in s. 8 of the Mayor's Court Act is, in my judgment, a condition of this kind. I say nothing as to that requiring notice of appeal. There is authority on the subject. The Court of Appeal held in *In re West Devon Great Consols Mine* (2) that the rules do not repeal the section of the Stannaries Act, 1869, which requires a deposit to

(1) By s. 8 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), in a cause in which the sum sought to be recovered exceeds 20*l.*, either party may appeal; "provided that such party shall, within two days after such determination or direction, give notice of appeal to the other party . . . . and also give security within such time or times as the Court shall direct, to be approved of by the registrar of the Court (if the judge shall so direct), for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant, and the appeal be dismissed."

(2) 38 Ch. D. 51.

be made on all appeals from the court of the vice-warden of the Stannaries; and in that case Bowen, L.J., says, "The rule 'generalia non specialibus derogant' applies," and adds, "I remember it having been similarly applied by the Court of Appeal as to a special rule relating to costs in a County Court." (1)

WRIGHT, J. I am of the same opinion. If the Mayor's Court Act had contained a provision that there should be no appeal where the claim was for less than 100*l.*, or that there should be none in any case without leave, I cannot suppose that the rules made under the Judicature Acts would have swept away the provision. Having regard to the dictum in *In re West Devon Great Consols Mine* (2), I hold that the giving of security for costs is one of the statutory conditions under which the right to appeal from the Mayor's Court arises, and that the rules do not affect this statutory condition.

Appeal dismissed.

Solicitor for plaintiff: *G. S. Ashby-Darby.*
Solicitors for defendant: *Nicholson, Graham, & Graham.*

(1) 38 Ch. D. at p. 56. (2) 38 Ch. D. 51.

H. D. W.

1893.
Oct. 24.

HANMER *v.* CLIFTON AND OTHERS.

Practice—Writ specially indorsed—Omission in Copy served on Defendants—Sufficiency of Indorsement—Amendment of Pleading—Marking of Copy delivered to opposite party—Order III., *r.* 6 (*f*); *Order* XXVIII., *rr.* 9, 10.

In an action for the recovery of land by a landlord against tenants whose term had expired, the writ was specially indorsed under Order III., r. 6 (*f*) with a statement of the date of the lease, the length of the term and the mode of devolution of the lessee's interest upon the defendants; but in the copy of the writ served upon the defendants the length of the term did not appear:—

Held, that the copy served upon the defendants gave them sufficient information to satisfy the requirements of Order III., r. 6 (*f*), and that they could not object that the writ was not specially indorsed within the meaning of that rule:

Held, further, that the directions in Order XXVIII., r. 9, as to marking an amended indorsement or pleading with the dates of the order for amendment and of the amendment did not extend to the copy of the amended indorsement or pleading delivered to the opposite party under Order XXVIII., r. 10.

APPEAL from a decision of Kennedy, J., at chambers, affirming an order of a master giving the plaintiff leave to sign final judgment under Order XIV., r. 1.

The writ in the action had been issued on June 21, and an appearance duly entered; by an order dated September 4, the writ was amended, but no fresh appearance was entered to the amended writ. The action was brought to recover possession of certain premises, and the writ as amended stated that they had been leased in 1828 for a term of sixty-five years by the plaintiff's predecessor in title to one Clark, and proceeded to trace the devolution of the defendants' title from the original lessee; the copy of the writ served on the defendants contained no statement of the length of the term for which the premises had been originally demised, but in other respects was an accurate copy of the original writ. Upon the writ being amended it was marked with the date of the order for amendment and the date of the amendment, as required by Order XXVIII., r. 9, but the copy served upon the defendants in compliance with Order XXVIII., r. 10, was not so marked. The master gave the plaintiff leave to sign final judgment, and the learned judge affirmed the order. The defendants appealed.

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HANMER v. CLIFTON.

P. T. Blackwell, for the defendants. First, the writ was not a specially indorsed writ within the meaning of Order III., r. 6, for the copy served on the defendants did not set out the term for which the lease was originally granted, which was a material part of the indorsement. Secondly, the copy of the amended writ served on the defendants was not marked with the date of the amendment. Order XXVIII., r. 9, requires an amended indorsement or pleading to be marked with the date of the order for amendment and of the day on which the amendment is made, and rule 10 provides that whenever any indorsement or pleading is amended "such amended document" is to be delivered to the opposite party within the time allowed for amendment.

[CHARLES, J. It seems to be a mere direction for marking, and not to affect the rights of the parties.]

No; the expression "such amended document" in rule 10 means a document marked as required by rule 9, and it is not a sufficient compliance with the rules if the mark is only placed on the original indorsement or pleading as amended and not on the copy served upon the opposite party. (1)

Loehnis, for the plaintiff, was not called upon.

CHARLES, J. In my opinion the decision of the learned judge, affirming the master's order, was perfectly right, and leave was properly given to the plaintiff to sign judgment in this action. The first point made is that in the writ as served upon the defendants the length of the term for which the original lease was granted was not specified; that is, that although it is specified in the amended writ itself it is not mentioned in the copy served on the defendants. But the copy served on the defendants does contain the date of the making of the lease, and it details at length how the premises included in the lease devolved upon the defendants from the original lessee. I am of opinion that this objection is untenable, and that the

(1) It was also contended that the case was governed by *Casey* v. *Hellyer* (17 Q. B. D. 97), and did not fall within Order III., r. 6 (*f*) at all, but the Court were of opinion that upon certain facts which were stated to have been admitted on the hearing of the summons before the master the defendants were clearly estopped from denying the plaintiff's title.

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HANMER v. CLIFTON.

Charles, J.

amended writ as served upon the defendants gave them ample information to satisfy the requirements of Order III., r. 6 (*f*).

Secondly, it is said that the amended writ as served upon the defendants does not comply with the requirements of Order XXVIII., rr. 9, 10, because the copy served upon the defendants did not bear a certain marking prescribed by those rules as necessary. On this point I agree with the learned judge at chambers, that the amended writ, though it must be marked as prescribed by rule 9, is nevertheless properly served or delivered, although there is no marking on the copy served on the opposite party. I think, therefore, that this appeal fails, and must be dismissed.

WRIGHT, J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Frere, Forster & Co.*

Solicitors for defendants: *Henry Kelly & Co.*

W. J. B.

1893

Nov. 30.

HOOD & SONS *v.* YATES. DERRETT, CLAIMANT.

Practice—Cause Proceeding in District Registry—Interpleader—Order XXXV., r. 6.

The Judicature Rules confer no jurisdiction upon a district registrar of the High Court to make an interpleader order.

APPEAL from chambers.

The action was commenced and proceeded with in the district registry of the High Court at Birmingham. The plaintiff recovered judgment, and such judgment was entered in, and the writ of execution issued from, the district registry. The sheriff of Warwickshire, with whom the writ was lodged, having seized certain goods in execution as being the goods of the defendant, the claimant claimed them as his property. The sheriff thereupon applied to a master in London for an interpleader order. The master refused the order on the ground that the application should have been made to the district registrar, and on appeal such refusal was affirmed by Kennedy, J. The sheriff appealed.

Channell, Q.C., and *Duke*, for the sheriff. There is no power in the district registrar to make an interpleader order. The only matters in which he has jurisdiction after final judgment are those mentioned in rules 4 and 5 of Order XXXV. (1), which matters do not include the making of an interpleader order. Rule 6 of that order was not intended to enlarge the jurisdiction given him by the preceding rules. If it were so, rule 5 would have been purely superfluous. But, secondly, even if rule 6 is to be read as giving him jurisdiction in interpleader proceedings, it does not give him exclusive jurisdiction. Whereas the preceding rules say that the proceedings therein mentioned *shall* be taken in the district registry, rule 6 only says that the registrar *may* exercise the authority and jurisdiction of a master, leaving to the master in London a concurrent jurisdiction which he cannot properly refuse to exercise.

E. Hume Williams, for the judgment creditor. Rule 6 of Order XXXV. provides that the district registrar may exercise, in respect of a cause or matter proceeding in the district registry, all such authority and jurisdiction as may be exercised by a master at chambers. By Order LIV., r. 12, a master may exercise jurisdiction in interpleader proceedings. Therefore a district registrar may make an interpleader order. This is the view

(1) Order XXXV., r. 4: "Where a cause or matter is proceeding in a district registry, all writs of execution for enforcing any judgment or order therein, and all summonses under the Debtors Act, 1869, shall issue from the district registry, unless the Court or a judge shall otherwise direct. Where final judgment is entered in the district registry costs shall be taxed in such registry unless the Court or a judge shall otherwise order."

Rule 5: "Where a cause or matter is proceeding in a district registry, all proceedings relating to the following matters, namely:

"(*a.*) Leave to enter judgment under Order XVI., rr. 50, 51;

"(*b.*) Leave to issue or renew writs of execution;

"(*c.*) Examination of judgment debtors for garnishee purposes, or under Order XLII., r. 32;

"(*d.*) Garnishee orders;

"(*e.*) Charging orders nisi;

shall, unless the Court or a judge shall otherwise order, be taken in the district registry."

Rule 6: "Where a cause or matter is proceeding in a district registry, the district registrar may exercise all such authority and jurisdiction in respect thereof as may be exercised by a judge at chambers, except such as by these rules a master [or chief clerk] is precluded from exercising."

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taken by the authors of the Annual Practice: see the note to Order LVII., r. 8. If rule 6 does not enlarge the jurisdiction given by rules 4 and 5, it is difficult to give it any sensible meaning. No doubt the use of the word "may" in rule 6 leaves a concurrent jurisdiction in the master at chambers; but it is a jurisdiction which the master is justified in refusing to exercise, the balance of convenience requiring that the application should be made in the district registry where the cause is proceeding, and where presumably all the parties reside. It has certainly been the practice in some counties for the sheriff to make the application in the district registry.

Channell, Q.C., in reply. It is admitted that the practice has not been uniform; but in the majority of counties the practice has been to make the application at the central office.

WILLS, J. I have come reluctantly to the conclusion that this appeal must be allowed. The facts of the case make one inclined to attempt to strain the interpretation of the rules the other way; for the whole of the proceedings in the case down to execution have been taken in the district registry; and it seems highly desirable that, under those circumstances, the interpleader question should be dealt with there too. And I cannot help thinking that the omission to give the district registrar jurisdiction to deal with interpleader matters was unintentional, and it may be that an amendment of the rules is desirable. But we have to construe the rules as we find them, and their language seems to be reasonably clear.

Order XXXV., r. 5, provides that, where a cause or matter is proceeding in a district registry, all proceedings relating to certain specific matters, of which interpleader is not one, shall be taken in the district registry unless the Court or a judge otherwise order. Then rule 6 says, that where a cause or matter is proceeding in the district registry the registrar may exercise all such authority and jurisdiction as may be exercised by a master; and it is contended that this gives the registrar jurisdiction in interpleader proceedings. But, if that contention is right, and if rule 6 makes a registrar's jurisdiction co-extensive with that of a master, what was the object of making rule 5, for all the matters

therein enumerated would be included in rule 6, and rule 5 would be wholly unnecessary? I think that rule 6 was not intended to enlarge the jurisdiction given to the registrar by the preceding rules, or to give him any power to make an interpleader order.

WRIGHT, J. I am of the same opinion. We are asked to hold that rule 6 gives the district registrar a jurisdiction co-extensive with that of a master, including jurisdiction in interpleader proceedings. But I think we cannot so hold, and for two reasons. In the first place, if rule 6 were held to confer the wide powers suggested, rule 5 would have been wholly superfluous; for every matter dealt with in rule 5 would be embraced in the wider powers of rule 6. And it cannot be suggested that the insertion of rule 5 was an unintentional redundancy, for rule 6 is to be found in the original rules of 1875, whereas rule 5 is not; which shews that the Rule Committee thought it necessary, notwithstanding the existence of rule 6, to insert rule 5. Secondly, in all the preceding rules, including rule 5, the jurisdiction of the district registrar is only to be exercised "unless the Court or a judge shall otherwise order"; whereas no such limitation is to be found in rule 6. And that omission seems conclusively to shew that it was not intended in rule 6 to give a wider jurisdiction than was already conferred by the earlier rules. The object of rule 6 was apparently to enable the registrar to use the powers of a master for the purpose of fully exercising the jurisdiction already given.

Appeal allowed.

Solicitors for sheriff: *Taylor, Hoare, & Box.*
Solicitor for judgment creditor: *H. Pumfrey.*

J. F. C.

1893
Dec. 5.

HULBERT & CROWE *v.* CATHCART.

Practice—Sequestration—Recovery of Judgment—Order for Payment of Money within limited Time—Want of Jurisdiction—Order XLI., *r.* 5; *Order* XLII., *rr.* 3, 6; *Order* XLIII., *r.* 6.

The plaintiffs, having recovered judgment against the defendant, a married woman, obtained from a master at chambers an order directing her to pay the amount recovered within ten days from the service of the order, and, in default of such payment, giving the plaintiffs leave to issue a writ of sequestration against her separate property:—

Held, that the master had no jurisdiction to make such an order.

APPEAL from the decision of Bruce, J., at chambers.

The plaintiffs recovered judgment in an action against the defendant, who was a married woman having separate property, for the sum of 145*l.* 9*s.* 10*d.* They obtained from a master at chambers an order directing that the defendant should pay the amount, recovered by the plaintiffs against her in the action, within ten days from the service of the order, and, in default of such payment, that the plaintiffs should be at liberty to issue a writ of sequestration against the defendant's separate property.

On appeal, this order was affirmed by the judge at chambers.

The defendant appealed.

The defendant, who appeared in person, was stopped by the Court.

[WRIGHT, J. What jurisdiction had the master to make such an order?]

Howland Roberts, (*Mallinson*, with him), for the plaintiffs. The order is right. By Order XLI., r. 5, the time within which the act ordered to be done is to be done must be stated in the order, as is done here, and by Order XLIII., r. 6, an order to do an act within a limited time may be enforced by a writ of sequestration. An order for the payment of money within a certain time is within the meaning of the rule: *Willcock* v. *Terrell*. (1) No doubt a writ of sequestration is only available where a time is fixed for payment, but by Order XLII., r. 3, a judgment for the recovery of money may be enforced by any of

(1) 3 Ex. D. 323.

the modes by which a judgment of any Court whose jurisdiction is transferred to the High Court might have been enforced. The judgments of the Court of Chancery might always be enforced by a writ of sequestration. The jurisdiction of the Court of Chancery has been transferred to the High Court by s. 16 of the Judicature Act, 1873, and therefore the master had power to make this order. Similar orders have been made before against this defendant. It is impossible, as is shewn by the affidavits, to realize the fruits of this judgment in any other way, as the defendant is a married woman, and is restrained from anticipation.

WILLS, J. In my opinion this order must be rescinded, on the ground that there was no jurisdiction to make it. We have listened to a very able argument, but it is quite clear that the only way in which Mr. Roberts can put the matter is to contend that it comes within Order XLII., r. 3: "A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court, whose jurisdiction is transferred by the principal Act, might have been enforced at the time of the passing thereof." His argument is that, inasmuch as in the Court of Chancery before the Judicature Acts there was power to make an order for the payment of money, and that order could be made to develop into a writ of sequestration, therefore an order for such a writ can now be made in the Queen's Bench Division of the High Court, and a judgment in the common law courts can be made to develop in the same way. I do not think so. The form of decree in a Chancery suit is that the unsuccessful party shall pay a certain sum of money; and we are told now that judges in the Chancery Division are in the habit of supplementing that decree by an order fixing the time within which the payment is to be made. I do not stop to inquire whether a judge has the power to do so, except where it was by inadvertence that the decree failed to fix such time. Assuming, however, that such an order can be made, how is it possible to apply it to a common law action? In such an action the judgment is that the party do recover so much; that is, of course, in

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any way that he can. How can a master or judge have power to fix a time within which he shall recover? The judgment is not an order to pay money; and for a master to order that the unsuccessful party shall pay the sum recovered within a certain time is totally to alter the nature of the remedy. There is clearly no power to make such an order. The order of the master, therefore, on which the plaintiff's case admittedly rests, is bad, and must be set aside.

I should have thought this was so, merely on the construction of Order XLII., r. 3; but my view is very much strengthened by rule 6, which says: "A judgment for the recovery of any property, other than land or money, may be enforced . . . . by writ of sequestration." That is as much as to say that a judgment for the recovery of money is not to be enforced by sequestration. It is true that in the present case an intermediate piece of machinery has been interposed by means of the order of the master to pay the sum within a certain time; but that does not assist the plaintiffs, since, as I have said, it was made without jurisdiction. Further, it seems a very great question whether a writ of sequestration will lie at all for a mere non-payment of money. Certainly, doubts to this effect were expressed by such great Chancery lawyers as James and Cotton, L.JJ., in *Ex parte Nelson, In re Hoare.* (1) There is yet another objection to this order, namely, that it is quite contrary to principle to make an order in the nature of an order in contempt, as a writ of sequestration is, when the person against whom it is made is not in contempt. This order is an order as upon a contempt if a hypothetical case shall become a real one, which is quite contrary to the decision in *Stonor* v. *Fowle.* (2) I therefore think that this appeal must be allowed.

WRIGHT, J. I am of the same opinion.

Appeal allowed.

Solicitors for plaintiffs: *Hulbert & Crowe.*

(1) 14 Ch. D. 41. (2) 18 Q. B. D. 213; 13 App. Cas. 20.

A. P. P. K.

BLAKEWAY *v.* PATTESHALL. 1893 *Nov.* 28.

County Court—Appeal—Death of Parties pending Appeal—Jurisdiction of High Court to add Legal Representatives.

Where, on an appeal being brought from a county court, one of the parties dies after the entry of the appeal, the High Court has jurisdiction to give leave to add the personal representative of the party so dying, and the application need not be made to the county court.

APPEAL from the county court of Worcestershire.

Judgment in the action was given in the county court in favour of the plaintiff on June 2, 1892. The defendant appealed. The appeal was entered on June 23, 1892. On July 24, 1892, the respondent died. On August 1, 1892, the appeal came on for hearing before Lord Coleridge, C.J., and Cave, J., who ordered the case to stand over to allow of the personal representative of the respondent being added. Probate of the respondent's will was granted on April 24, 1893. In the meantime the appellant also had died, on November 13, 1892, and his will was proved on October 7, 1893.

T. M. Whitehouse, for the respondent, moved for leave to add the legal personal representatives of both the appellant and respondent.

[WILLS, J. As this is a county court action, ought not the application to be made to the county court judge ?]

In two unreported cases of *Williams* v. *Line* (February 23, 1891), and *Myers* v. *Wilson* (June 1, 1892), similar leave was given by the Divisional Court.

THE COURT (Wills and Wright, JJ.) granted the application.

Leave granted as prayed.

Solicitor for respondent: *Wellington Taylor.*

J. F. C.

C. A.
1893
Dec. 11.

[IN THE COURT OF APPEAL.]

GORDON *v.* EVANS.

County Court—Practice—Default Summons issued out of Jurisdiction—Affidavit, Form of—Claim exceeding 5l.—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 86—*Order v., rr.* 9*a*, 10 (*County Court Rules*, 1889)—*Form* 14A.

Where a plaintiff in a county court, whose claim exceeds 5*l.*, seeks to issue a default summons out of the jurisdiction of such court, the affidavit filed by the plaintiff for that purpose need not contain a statement that the defendant does not belong to any of the classes of persons mentioned in Order v., rule 10, of the County Court Rules, 1889, such a statement not being material where the claim exceeds 5*l.*

APPEAL from order of a Divisional Court (Wills and Wright, JJ.), setting aside the order of a judge at chambers for a prohibition to the county court of Birmingham.

The facts were as follows:—

The action which it was sought to prohibit was for the sum of 19*l.* 10*s.* upon a promissory note, payable at Birmingham, made by the defendant, who resided at Ludlow, out of the jurisdiction of the Birmingham County Court. Leave had been granted by the registrar of the Birmingham County Court to the plaintiff to issue a plaint note and default summons against the defendant under the Summary Procedure on Bills of Exchange Act, 1855. (1)

The affidavit, upon which such leave was given, followed the Form 14A in the appendix to the County Court Rules, 1889, so far as the first three paragraphs were concerned; it stated that a material part of the cause of action arose within the district of the Birmingham County Court; but it omitted paragraph 4 of the form, and, consequently, did not state that the defendant was not a domestic or menial servant, a labourer, a servant in husbandry, a journeyman, an artificer, a handicraftsman, a miner, or a person engaged in manual labour.

The defendant applied at chambers for a prohibition on the ground that there was no jurisdiction in the Birmingham County

(1) See Forms 9 and 17A of the County Court Forms.

Court to give leave to enter the plaint and issue the default summons thereupon under the County Courts Act, 1888, and County Court Rules, the affidavit not being in accordance with the requirements of the Act and rules.

The application was granted by Kennedy, J., at chambers; but, on appeal, the Divisional Court reversed his decision, on the ground that there was jurisdiction to enter a plaint in the case, and, that being so, the proceedings in the action subsequent thereto, with regard to the issue of the plaint note and default summons, though they might be irregular, were not in excess of jurisdiction. (1)

(1) Sect. 74 of the County Courts Act, 1888, provides that, "except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant, or one of the defendants, shall dwell or carry on his business, at the time of commencing the action or matter; or it may be commenced, by leave of the judge or registrar, in the court within the district of which the defendant, or one of the defendants, dwelt or carried on business, at any time within six calendar months next before the time of commencement, or, with the like leave, in the court in the district of which the cause of action or claim, wholly or in part, arose."

Sect. 86 of the same Act provides that, "(1.) Subject to any rules and orders under this Act, in any action in a court for a debt or liquidated money demand, the plaintiff may, at his option, cause to be issued a summons in the ordinary form, or (upon filing an affidavit to the effect set forth in the prescribed form) a default summons in the prescribed form or to the prescribed effect, &c. . . . . (6.) Provided always that no other summons than a summons in the ordinary form shall, without leave of the judge or registrar, be issued where the amount claimed shall not exceed five pounds, unless the action is for the price, value, or hire of goods which, or some part of which, were sold and delivered or let on hire to the defendant to be used or dealt with in the way of his trade, profession, or calling, and such leave shall be given in the manner prescribed."

Order v., rule 9a (County Court Rules, 1889), provides that, "where leave to enter a plaint under s. 74 of the Act is required, an application shall be made upon the affidavit of the plaintiff or of some person on his behalf who has knowledge of the facts, according to the form in the appendix . . . ."

Order v., rule 10, provides that, "Where pursuant to the proviso in s. 86 of the Act the leave of the judge or registrar is required for the issue of a default summons, no such leave shall be given, unless the occupation and description of the defendant shall be fully set out in the affidavit given in the appendix, and no such leave shall be given in cases where in the affidavit it appears that the defendant is a domestic or menial servant, a labourer, a servant in husbandry, a journeyman, an artificer, a handicraftsman, a miner, or any person engaged in manual labour."

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R. H. Spearman, for the defendant. The county court of Birmingham had no jurisdiction in this case to allow a plaint in this form to be entered or to issue a default summons. A summons in the county court under the Bills of Exchange Act, 1855, is clearly a "default summons" within the meaning of the County Courts Act, 1888, and the rules made under it: see Form 17A. The form of plaint note where there is a default summons is different from the ordinary form: see Forms 7, 8, 9. In this case the defendant did not reside or carry on business within the district of the county court. Therefore the default summons was issued out of the jurisdiction. There is no jurisdiction to allow such a plaint note and summons to issue, unless certain conditions prescribed by the Act and rules are fulfilled.

By s. 74 of the County Courts Act, 1888, leave is necessary to enter a plaint in the court of a district other than that in which the defendant dwells or carries on business; and by Order v., rule 9a, of the County Court Rules, 1889, where that is the case, the application for leave must be upon affidavit according to the form in the appendix. Under s. 86, sub-s. 1, of the County Courts Act the plaintiff can only issue a default summons "on filing an affidavit to the effect set forth in the prescribed form"; and the leave of the judge or registrar is necessary for the issue of any summons other than a summons in the ordinary form, where the amount claimed does not exceed 5*l*., unless the action is for the price, value, or hire of goods sold or let to the defendant to be used or dealt with in his trade, profession, or calling. By

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Form 14A in the appendix to the County Court Rules, 1889, is headed "Affidavit for leave to issue ordinary or default summons out of jurisdiction." Paragraphs 1, 2, and 3 are applicable to both kinds of summons. The remainder of the form is as follows:—

"4. And I further say that the said C. D. is not a domestic or menial servant, a labourer, a servant in husbandry, a journeyman, an artificer, a handicraftsman, a miner, or a person engaged in manual labour."

To be added where a default summons is proposed to be issued.

"5. And I further say that my [*or* the plaintiff's] claim is for the price [*or* value *or* hire] of goods which, or some part of which, were sold and delivered [*or* let on hire] to the said C. D. to be used or dealt with in the way of his trade [*or* profession *or* calling] of a [*state the trade profession or calling*]."

To be added where a default summons is proposed to be issued and the claim does not exceed 5*l*.

Order v., rule 10, of the County Court Rules, 1889, "no such leave shall be given, unless the occupation and description of the defendant shall be fully set out in the affidavit given in the appendix, and no such leave shall be given in cases where in the affidavit it appears that the defendant is a domestic or menial servant, a labourer, a servant in husbandry, a journeyman, an artificer, a handicraftsman, a miner, or any person engaged in manual labour." On reference to the form of affidavit given in the appendix, viz., Form 14A, it will be seen from the marginal direction appended to paragraph 4, that, in cases where an ordinary or a default summons is required for service out of the jurisdiction, the affidavit must state that the defendant is not a domestic or menial servant, &c. The rules made in pursuance of the Act under s. 164 are made part of the Act by the opening words of s. 86.

H. Tindal Atkinson, for the plaintiff. The proviso in s. 86 of the County Courts Act, 1888, governs the whole matter. Sect. 86 deals with the issuing of default summonses; and then by sub-s. 6 it is provided that no summons other than a summons in the ordinary form, which would include "default summons," shall be issued without leave where the claim does not exceed 5*l.*, except in certain specified cases. Order v., rule 10, only applies to cases where leave is necessary under that proviso, i.e., where the amount claimed does not exceed 5*l.* The effect of the whole legislation is that, unless the claim is for goods sold or let to the defendant in the way of his calling, in any case where the claim does not exceed 5*l.* no default summons shall be issued without leave, and it shall not issue, even with leave, if the defendant follows any of the occupations mentioned in rule 10. Therefore, where the plaintiff is claiming a sum exceeding 5*l.*, the affidavit need not state that the defendant is not a domestic or menial servant, &c. Here the claim was for 19*l.* 10*s.*

Spearman, in reply. Sect. 86, sub-s. 1, and Order v., rule 9a, provide that the affidavit shall be according to the form given in the appendix; and from the directions appended to the form it is clear that where a default summons is to be issued the affidavit is to contain the statement set forth in paragraph 4.

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LORD HALSBURY. When once the provisions of the County Courts Act, 1888, and the rules made under it, are understood, this case appears to me to be free from doubt. The Act gives power in certain cases to issue a default summons out of the jurisdiction of the Court in which the action is commenced. The proviso to s. 86 enacts that no other summons than a summons in the ordinary form shall be issued without the leave of the judge or registrar where the amount claimed does not exceed 5*l.*, unless the action is for the price, value, or hire of goods which, or some part of which, were sold and delivered, or let on hire to the defendant to be used or dealt with in the way of his trade, profession, or calling, and such leave shall be given in the manner prescribed. A default summons is a summons not in the ordinary form, and therefore is within the proviso. Then Order v., rule 10, of the rules made in pursuance of the Act adds a further provision, viz., that, where pursuant to the proviso in s. 86 the leave of a judge or registrar is required for the issue of a default summons, no such leave shall be given, unless the occupation and description of the defendant shall be fully set out in the affidavit given in the appendix, and no such leave shall be given in cases where in the affidavit it appears that the defendant is a domestic or menial servant, a labourer, a servant in husbandry, a journeyman, an artificer, a handicraftsman, a miner, or any person engaged in manual labour.

The scope of this provision, construed as it must be with reference to the proviso to s. 86, appears to me to be very intelligible. Where application is made for a default summons in a case in which the amount claimed does not exceed 5*l.*, the affidavit, which is necessary in order to obtain leave to issue such a summons, must set forth the occupation and description of the defendant; and, if it shews that he is one of certain classes of persons whom the framers of the rules appear to have intended to protect from the liability to a default summons in such a case, the leave cannot be granted. In this case the amount claimed does exceed 5*l.* The form of affidavit (14A) prescribed in the appendix to the County Court Rules obviously provides for various cases, and is elastic in the sense that it admits of modification to suit the particular case in question, the intention

clearly being that only what is relevant to the particular case shall be inserted, and that what is irrelevant shall be left out. It is argued that in the present case, because the affidavit did not contain what is included in paragraph 4 of the form, it was not such an affidavit as was required by the Act and rules as a condition precedent to the issue of the default summons out of the jurisdiction; and therefore there was no jurisdiction to issue the plaint note and summons. I do not think it necessary to go into the question whether the Divisional Court were right in saying that, if there was jurisdiction to issue a plaint note in this case, what followed was mere irregularity, and not matter going to the jurisdiction; because I am of opinion that the true construction of the statute and rules is clearly to the effect which I have stated, notwithstanding the marginal note to Form 14A on which reliance has been placed, and therefore the affidavit was in the proper form and the objection to the jurisdiction fails. I was unable to elicit from the counsel for the defendant what the explanation of that marginal note was, unless it was intended to have relation to the proviso of s. 86 and Order v., rule 10. All he could say was that it was provided that there should be an affidavit in a certain form, and that the marginal note to that form gave certain directions. I do not hesitate to say that in my opinion the mode in which that marginal note is framed is a blunder—an observation which I am entitled to make with regard to a mere direction in a marginal note. I think the direction appended to paragraph 5 is applicable to paragraph 4. For these reasons, I think the appeal should be dismissed.

LOPES, L.J. I agree that the appeal should be dismissed. I do not think it is necessary to decide the question whether it is correct to say that, if there was jurisdiction to issue a plaint note in this case, what followed was mere irregularity. In my opinion the conjoint effect of the proviso to s. 86 and of Order v., rule 10, is to confer a privilege on those following the occupations specified in the latter only in the case of claims which do not exceed 5*l*.

DAVEY, L.J. I am of the same opinion. It seems to me clear that the rules only mean that the affidavit shall be in the form

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given in the appendix so far as it is applicable. So much of the form as is irrelevant to the particular case in question is not applicable. The rules do not make a marginal direction appended to the form part of the form, and we are entitled to say that such a marginal note has been put in by mistake.

Appeal dismissed.

Solicitors for the plaintiff: *Robbins, Billing & Co.*

Solicitor for the defendant: *E. Ricketts, for C. B. Cottam, Ludlow.*

E. L.

1893 *Nov.* 25, 30.

IN RE A SOLICITOR. EX PARTE THE INCORPORATED LAW SOCIETY.

Solicitor—Professional Misconduct—Solicitor borrowing Money from Client without Independent Advice—Disciplinary power of Court.

The report of the Committee of the Incorporated Law Society having found that a solicitor was guilty of professional misconduct, in having accepted as a loan large sums of money from a client, who had just attained his majority:—

Held, that it was a case for the exercise of the disciplinary powers of the Court.

APPLICATION of the Incorporated Law Society bringing before the Court the report of the committee under s. 13 of the Solicitors' Act, 1888.

The report stated that the charges which were made against the solicitor were (inter alia):—

"(1.) That the respondent received from a client, who attained the age of twenty-one in the month of April, 1887, several sums amounting to 69,500*l.*, the first sum being paid to him on May 16, 1887, and the last sum on November 7, 1887; that such sums were paid to the respondent by his client for investment; that they were not invested, and that a large part of the money was misappropriated by the respondent to his own use."

As to this the committee reported that—

It was proved that the client came of age on April 2, 1887, that he had previously known the respondent, and during his minority had borrowed money of him. The client went abroad

in October, 1887, for a long tour. It was proved that the client paid to the respondent on May 16, 1887, 5000*l.*; on June 12, 1887, 10,000*l.*; on July 8, 1887, 10,000*l.*; on September 13, 1887, 40,000*l.*; and on November 7, 1887, 4500*l.* No letters or memoranda were produced to shew the terms on which or the purposes for which these sums of money were received by the respondent from the client, and the respondent in his examination before the committee swore that there was nothing in writing to shew the terms. He said that it did not occur to him to make a written record or to ask the client to do so. He further swore that he kept no diary, and that although he kept a ledger his account in it with the client had only been written up within the last few weeks. The respondent swore that the arrangement between himself and the client was that the whole five sums were lent to him (the respondent), and that he was to pay 5 per cent. interest for them, and to use the money as he liked, but he could not say when such arrangement was made.

The committee found that if they were to believe the respondent's evidence that the moneys were sent to him as "a loan to himself, to be used as he liked on the terms of his paying the client interest at the rate of 5*l.* per cent. per annum," they were of opinion that the respondent was guilty of professional misconduct in accepting such large sums from a client immediately after he attained twenty-one, whom he had placed under an obligation by making him an advance during his minority.

The client was not called to give evidence before the committee.

T. T. Paine, for the Incorporated Law Society.

Channell, Q.C., and *Wedderburn*, for the solicitor.

Cur. adv. vult.

Nov. 30. WILLS, J. (after referring to the other charges contained in the report which he held to be not proven). But then there remains the more general charge which the committee have found to be established under the first head, and as to which I cannot come to any other conclusion than that they

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were right. I will say a word presently as to its being professional misconduct. I think this much is most clearly established, that the respondent had for his client a young man just turned twenty-one years of age, that the solicitor was his professional adviser, under circumstances which created, if anything, in an unusual degree, the confidential relations under which a solicitor is bound to supply to a client certainly very likely to need them, all the advantages which knowledge, experience of the world, and an acquaintance with the necessarily strict rules of conduct, with regard to the exercise of professional relations, would call for. Now under such circumstances has a solicitor the right, without putting his client in the most distinct fashion at arm's length with him, to allow himself to take from him enormous sums of money as loans to himself, to be used more or less in his own speculations? Is it not his duty to take care that at all events his client shall not be at a distinct disadvantage because he trusts to him for advice instead of going to some independent person? It is a principle which I should have thought was fundamental in guiding the relations not only of solicitors towards their clients, but of all persons who stand in confidential relations towards others. A trustee is not allowed to make out of his trusteeship any advantage to himself. The conduct of a medical man, for instance, who is about the deathbed of a patient, is regarded with singular suspicion if he gets any special advantages for himself, and I should think that it must be patent and indisputable that personal advantages obtained by a solicitor from his client, whilst in the exercise of his professional relationship towards him, could not be maintained if they were impeached by the party entitled to complain of them. The solicitor, therefore, must have known, I should have thought, when he was dealing in this way with his client, that he was doing a thing which, as a matter of civil right, could not stand if it was challenged, and that he was doing a thing also which the whole tone of his profession was against. Upon the question of whether or not matters of this kind amount to professional misconduct, I cannot help thinking that the committee of the Law Society ought to be very safe and sound guides. I believe that one reason why these investiga-

tions were committed to them instead of remaining in the hands of the masters of the High Court, as they used to be, was that complaints were sometimes made that masters, who had not been solicitors themselves, had not the professional touch in matters of this kind, and did not understand either the mechanical processes by which solicitors do their business, or the kind of feelings which constitute the general tone of the profession; and it was said that solicitors who were the subjects of charges of this kind suffered on occasions by reason of the master adopting a standard of what was right or wrong in particular matters too high, possibly even pedantic. I believe it was in great measure to meet that complaint that the transfer of jurisdiction took place from the masters to the committee, and it is difficult to suppose that the Court can have a better guide as to what ought to be considered professional misconduct than the opinion of those holding the highest and most distinguished places in the ranks of the solicitors. I do not for a moment say that we are not entitled, and that we may not occasionally be called upon, to review a decision of the committee as well as to criticise any other part of their report, but I must say it would take a good deal to make me form a judgment upon what is professional misconduct at variance with the decision of the committee. I always thought myself that the chances were that the persons who were accused of matters of professional misconduct would find that they had not changed their tribunal in their own interests, and that the professional tribunal created by the Act of 1888 would act with quite as much rigour as the masters ever did in matters of this kind, because the members of the committee would feel that they had exactly that professional touch which is of such value in estimating these matters.

In the present instance it cannot be doubted that they have come to a right conclusion. Here is a solicitor, a man of ripe age, who has a client of twenty-one, a young man of extravagant habits, who, although perfectly competent to understand matters of business, yet still could hardly have been what is ordinarily called a business-man, and who clearly was a good deal under the influence of his professional adviser. One cannot help feeling that the client has suffered grievously, from the fact of the

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solicitor combining the two inconsistent characters, which he never ought to have allowed himself for one moment to assume at the same moment, that of a borrower gaining a personal advantage from the use of these large sums and that of professional adviser to the young man. I think that the client must have understood something of what was taking place, because there is a letter from the respondent to his client which clearly indicates that with regard to something like 64,000*l.* he would guarantee 5 per cent. upon the money to his client. No man guarantees 5 per cent. unless he expects to get a higher percentage, and I think the client must have perfectly understood that. The client's letter in reply shews that he was not altogether satisfied, because he says, "I must give you twelve months' notice, and you must repay this money to me." Unfortunately portions of the money have never been repaid, because that happened which any independent adviser would have told this young man was bound to happen, namely, that a man who got money into his hands and guaranteed 5 per cent. for the purpose of making 6, 7, or 8 per cent., was pretty certain to end by not being able to repay considerable portions of it. In that respect it is impossible to defend the conduct of the respondent, and impossible to say that it was other than very grave and serious professional misconduct. I could easily go through the subsequent transactions, but it does not seem to me to be necessary to do so, because this part of the case does not depend at all upon what took place subsequently, or upon what the client chose to do afterwards, or on anything the client could have said if he had come before the committee. This part of the case, therefore, stands exactly where it was, namely, that the solicitor was guilty of professional misconduct in combining these two inconsistent and contradictory relations, which no man in his position ought ever have allowed himself to do.

Now, it has been our very painful duty to consider under these circumstances to what extent our censure should go, and what degree of punishment we ought to inflict. I cannot think that the high character which has been given to the solicitor, and the good opinion of many friends in and out of the profession, can make any difference. It cannot be permitted that those

who stand at the head of the profession should allow themselves looser moral notions upon such a subject than those who stand lower down. How can it be expected that any proper standard of professional conduct will be maintained by the shadier portion of the profession, if those higher up are allowed with impunity to set them an example of such grave forgetfulness of all that ought to be present to a right-minded man on such a subject as is involved in this case? Acquitting the respondent as we do on the grosser charges contained in the report and of actual dishonesty in the shape of anything like misappropriation of money to his own use, we think we ought not to strike him off the rolls, but we think that he ought to undergo a suspension of two years, which, to a man in his position, must be a very heavy punishment.

WRIGHT, J., concurred.

Order accordingly.

Solicitor for the Incorporated Law Society: *S. P. B. Bucknill.*
Solicitor for the solicitor: *J. C. Stogdon.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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Dec. 15.

IN RE VITORIA. EX PARTE THE SPANISH CORPORATION, LIMITED.

Bankruptcy — Appeal — Practice — Appeals from County Courts — Sending Notice of Appeal to Registrar — Irregularity — Discretion to extend Time — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 104 (*d*), 105 (4), 143 — *Bankruptcy Rules*, 1886 *and* 1890, *r.* 132.

In an appeal from an order in bankruptcy made by a county court, the Court appealed to ought not, where no special circumstances are shewn, to extend the time for complying with rule 132 of the Bankruptcy Rules, 1886 and 1890, which provides that "upon entering an appeal a copy of the notice of appeal shall forthwith be sent by the appellant to the registrar of the Court appealed from"; nor ought the omission to comply with the rule to be treated as an irregularity which can be cured.

APPEAL from the decision of a Divisional Court sitting to hear appeals from orders in bankruptcy made by county courts.

The registrar of the Croydon County Court, having refused to make a receiving order against J. F. Vitoria upon the petition of

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the Spanish Corporation, Limited, the petitioners appealed to the Divisional Court.

No copy of the notice of appeal was sent by the petitioning creditors to the registrar of the county court, as required by rule 132 of the Bankruptcy Rules, 1886 and 1890, the omission having, it was said, occurred owing to the forgetfulness of the firm of solicitors who at that time represented the petitioning creditors, but subsequently ceased to represent them.

A preliminary objection was taken in the Divisional Court on behalf of J. F. Vitoria, that the appeal did not lie because rule 132 had not been complied with. The Divisional Court (Williams and Kennedy, JJ.) overruled the objection on the following grounds:—

Under the Bankruptcy Rules of 1870, made under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), by rules 143, 144, an appeal was entered by leaving with the registrar of appeals a copy of the appeal notice of motion, and upon entering the appeal a copy of the same notice was to be sent forthwith by the appellant to the registrar of the Court appealed from, and a similar copy was to be delivered by the appellant to each respondent four days before the day on which he intended to move. The sending of the copy of the appeal notice to the registrar of the Court appealed from was, therefore, the only notice that the appeal had been brought which the respondents got when the appeal was entered; whereas under the rules of 1886 and 1890, r. 134, the procedure as to appeals was regulated by the provisions of Order LVIII. of the Rules of the Supreme Court, which required that the notice of appeal should be served directly upon all the parties to the appeal. The decisions under the Rules of 1870 in *In re Sillence, Ex parte Sillence* (1) and *Ex parte Lamb, In re Southam* (2) (in which cases a similar objection to the present was held to be fatal), did not apply to appeals under the Rules of 1886 and 1890. The only object of sending a copy of the notice of appeal to the registrar, as required by rule 132, was to ensure his having the file of the proceedings in court. The omission to send it was, therefore, a mere irregularity which could be cured.

(1) 7 Ch. D. 238. (2) 19 Ch. D. 169.

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The learned judges proceeded to hear the appeal, and in the result reversed the registrar's order, and made a receiving order against J. F. Vitoria, who now appealed to the Court of Appeal.

Jelf, Q.C., and *F. Cooper Willis*, (*Ivor Bowen*, with them), for the appellant. The creditors had no right to appeal to the Divisional Court, because they had not given to the registrar the notice required by rule 132 of the Bankruptcy Rules, 1886 and 1890. (1) In *In re Sillence, Ex parte Sillence* (2), a similar objection, taken under rule 143 of the Bankruptcy Rules, 1870, was held fatal, and in *Ex parte Lamb, In re Southam* (3), the ruling of Bacon, C.J., to the same effect was upheld by the Court of Appeal. Rule 134 of the Rules of 1886 and 1890 (which provides that Order LVIII. of the Rules of the Supreme Court shall apply to appeals to the Court of Appeal) does not affect the point under discussion, because the rule only applies to appeals to the Court of Appeal, and it is made "subject to the foregoing rules." Rule 132 of the Rules of 1886 and 1890 provides that a copy of the notice of appeal shall be sent to the registrar of the Court appealed from "forthwith," and there are no circumstances in this case to justify the Court in extending the time under the powers given by s. 105, sub-s. 4, of the Bankruptcy Act, 1883. The Bankruptcy Act, 1869, contained a similar section; but in *Ex parte Donnithorne, In re Green* (4), decided under that Act, it

(1) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 104 (which relates (inter alia) to appeals from orders of county courts), "(*d*) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal."

By s. 105, "(4.) Where by this Act or by general rules the time for doing any act or thing is limited, the Court may extend the time, either before or after the expiration thereof, upon such terms, if any, as the Court may think fit to impose."

By s. 143, "No proceeding in bankruptcy shall be invalidated by any . . . . irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the . . . . irregularity, and that the injustice cannot be remedied by any order of that Court."

By the Bankruptcy Rules, 1886 and 1890, r. 132, "Upon entering an appeal, a copy of the notice of appeal shall forthwith be sent by the appellant to the registrar of the Court appealed from."

(2) 7 Ch. D. 238.

(3) 19 Ch. D. 169.

(4) 40 L. T. (N.S.) 660.

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was held that the word "forthwith" must receive a strict construction. Sect. 101 (*d*) of the Bankruptcy Act, 1883, is conclusive to shew that the general rules with respect to appeals must be strictly complied with, and that—even if compliance with rule 132 of the Rules of 1886 and 1890 is not a condition precedent to the right of appeal—no extension of time ought to be granted, or dispensing power exercised, except under very special circumstances.

Finlay, Q.C., and *Ringwood*, for the respondents. Under the Bankruptcy Rules of 1870, rr. 143, 144, the notice to the registrar was the only notice of the appeal having been brought which the respondent got, whereas under rule 134 of the Bankruptcy Rules, 1886 and 1890, appeals are regulated by Order LVIII. of the Rules of the Supreme Court; so that now notice of appeal must be served upon all the parties directly interested in the appeal. Rule 132 of the Rules of 1886 and 1890 is only necessary in order to give notice to the registrar to have the file of the proceedings in court. No injustice or hardship can be done by the omission to send a copy of the notice of appeal to the registrar. It was different under the old rules upon which *Ex parte Lamb, In re Southam* (1), was decided, and in that case Jessel, M.R., pointed out that the word "forthwith" must be construed according to the circumstances in which it is used. Having regard to the limited object of the rule now under discussion, and to the fact that no hardship or injustice can be caused by the non-compliance with it, the Court ought to treat the irregularity as one which can be cured under s. 143 of the Bankruptcy Act, 1883, or the time for sending a copy of the notice of appeal to the registrar ought to be extended under s. 105, sub-s. 4.

[They also referred to *Ex parte Williams, In re Jones* (2); *Ex parte Viney, In re Gilbert* (3); *Christopher* v. *Croll.* (4)]

Jelf, Q.C., replied.

LORD HALSBURY. I am of opinion that the preliminary objection taken in the Divisional Court on behalf of the appellant

(1) 19 Ch. D. 169.
(2) 46 L. T. (N.S.) 237, 242.
(3) 4 Ch. D. 794.
(4) 16 Q. B. D. 66.

here is fatal. I do not intend to lay down any general rule upon any of the other subjects which have been discussed in this case; but when I find a statutory direction, such as is contained in s. 104 (*d*) of the Bankruptcy Act, 1883, that "no appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal," and when I am called upon to exercise the discretion given to the Court by s. 105 by enlarging the period within which under the general rules notice of the appeal is to be sent to the registrar of the Court appealed from, it is impossible not to see that the legislature for some good reason has not left the matter absolutely to the discretion of the Court, but has given a rule to guide them in exercising that discretion. It would have been easy for the legislature to have said that, where no injustice resulted from non-compliance with the rules as to appeals, compliance with them might be dispensed with. It has not done so in any way. It has thought right to give a criterion to guide the Court in the exercise of the discretion—which I admit exists—by saying that the appeal shall only be entertained if the rules are complied with. I confess I should have taken the same view if *Ex parte Lamb, In re Southam* (1), had not been decided. I do not consider it material to consider whether it might or might not have been argued in that case that no injustice had been caused by the mistake which had been made; but it seems to me that the whole Court were of opinion that the fact that the legislature had used the word "forthwith" in rule 144 of the Bankruptcy Rules, 1870, was, in the absence of any special or peculiar circumstances, conclusive to shew that the act required by the rule to be done should be done without any unnecessary delay. Here the notice required to be sent to the registrar by rule 132 of the rules made under the Bankruptcy Act, 1883, has not been sent at all. The only excuse given is that the non-compliance with the plain direction of the rule resulted from a slip or from forgetfulness. If we were to hold that such compliance might be dispensed with, the marginal note of the case would be: The slip or the forgetfulness of a solicitor constitutes such special circumstances as will justify the

(1) 19 Ch. D. 169.

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Lord Halsbury.

Court in dispensing with compliance with the direction contained in rule 132. I think it would be wrong to hold that the dispensing power should be exercised when all that the litigant can say is, "My solicitor made a blunder and forgot to give the notice." No good reason for laying down such a rule has been shewn to us. The limits with respect to the time in which, under the rules, acts are to be done are, no doubt, subject to certain qualifications; but the circumstances must be special in order to justify the Court in granting relief. No such special circumstances are alleged to exist in the case now before us. The thing required by the rule to be done "forthwith" has not been done up to this moment. I am, therefore, of opinion that we ought not to dispense with the obligation to comply with the rule. With the greatest possible respect for the opinion of the judges of the Court below, I cannot agree with the view which they seem to have taken on this point, and I cannot help thinking that s. 104 (*d*) of the Bankruptcy Act, 1883, was not called to their attention. I think that the preliminary objection to this appeal ought to succeed; that our judgment should be for the appellant here, and that the receiving order should be rescinded.

LOPES, L.J. I entirely agree with the conclusion at which Lord Halsbury has arrived, for the reasons given by him. I have nothing to add to what he has said in giving judgment.

KAY, L.J. I also entirely agree. Out of respect for the learned judges in the Court below, from whom we are differing, I will add a very few words. I should be sorry to say that in no possible event could the discretion to enlarge the time be exercised; but I do say that when you find an enactment in s. 104 (*d*) of the Bankruptcy Act, 1883, that no appeal "shall be entertained" except in conformity with the general rules for the time being in force, and where one of those general rules says that upon entering an appeal a copy of the notice of appeal shall "forthwith" be sent by the appellant to the registrar of the Court appealed from, then special circumstances must be shewn in order to justify the Court in extending the time for doing

what the rule directs. None such are shewn here, and I am, therefore, of opinion that the appeal to this Court should be allowed.

Appeal allowed.

Solicitor for appellant: *H. W. Christmas.*

Solicitors for respondents: *Jenkins, Baker, & Macklin.*

W. A.

KEMP *v.* WANKLYN.

1893 *Dec.* 5.

Parliament—Registration—Borough Vote—Service of Notice of Objection—"Ordinary course of Post"—6 & 7 *Vict. c.* 18, *ss.* 17, 100.

Notices of objection to borough voters under 6 & 7 Vict. c. 18, s. 17, were posted addressed to barracks in which the voters resided. According to the military and postal regulations, letters thus addressed are not delivered at the barracks by postmen, but are taken from the post-office to the barracks by orderlies. The notices were brought to the barracks by an orderly on August 19, when the voters were absent in camp, and were by mistake not sent on till August 21. If the voters had been in the barracks, they would have received the notices on August 19; but for the mistake, they would have received them at the camp on August 20, the last day for giving notice of objection:—

Held, on the authority of *Childs* v. *Cox* (20 Q. B. D. 290), that the facts did not shew that there was any "ordinary course of post" to the barracks within the meaning of s. 100, and that there was therefore no evidence of the service of the notices on or before August 20.

Semble (per Lord Coleridge, C.J., and Lawrance and Collins, JJ.), that *Childs* v. *Cox* (20 Q. B. D. 290) was wrongly decided.

CASE stated by the revising barrister for the borough of Colchester.

The appellant objected to the names of Moses Stockton Atkyns and forty-six other persons being retained in Division II. of the list, as parliamentary voters in respect of dwelling-house qualifications in the barracks within the borough. It was contended that there was no proof of the service of the notices of objection on or before August 20. The appellant relied on stamped duplicates as evidence of delivery "in the ordinary course of post," in accordance with s. 100 of 6 & 7 Vict. c. 18.

The case stated as follows: "It was proved that it is the universal practice, in accordance with the military and postal regulations in towns where soldiers are quartered, that letters

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addressed to soldiers in barracks are not delivered at the barracks by the post-office authorities, but are delivered at the post-office in private bags to orderlies appointed from each regiment for that purpose, and are taken to the barracks by them and delivered to the persons to whom they are addressed."

"The notices of objection in this case, which were registered in accordance with the statute, were delivered to the orderly in the usual way; but the orderly did not sign the receipts for the notices, but took them away in blank, and they were afterwards returned to the post-office signed by the persons to whom the notices were addressed."

"The voters had left Colchester at some time between July 15 and August 19, and were, in fact, at the latter date at the camp at Aldershot."

"It was proved that the notices of objection were brought to the barracks by the post orderly at about 1.45 P.M. on Saturday, August 19, and that the corporal in charge of the orderly room, believing from their appearance that they were of the nature of circulars, and having instructions to keep back circulars, on account of the expense of forwarding them, in the exercise of his discretion, put them aside till he could consult an officer."

"On Sunday, August 20, he saw an officer, who directed him to forward the notices, and they were, in fact, forwarded to the voters on Monday, August 21."

"If the voters had been still in the barracks at Colchester, at the places of abode stated in the list, the notices would have been distributed by the post orderly on the afternoon of August 19, and if they had been re-directed and posted on the afternoon of August 19 they would have been delivered at Aldershot on August 20. If the corporal in charge had thought that they were of the nature of letters and not circulars, he would have so re-directed and posted them."

The revising barrister held that the case could not be distinguished from *Childs* v. *Cox* (1); that there was, therefore, no delivery "in the ordinary course of post" at the barracks within the meaning of s. 100, and the stamped duplicates were not available to prove the service of the notices of objection, and the names

(1) 20 Q. B. D. 290.

must, therefore, be retained on the list. He stated the case in order that the decision in *Childs* v. *Cox* (1) might be further considered.

Lewis Thomas, for the appellant, contended that the facts stated shewed an "ordinary course of post" to the barracks. He referred to *Noseworthy* v. *The Overseers of Buckland-in-the-Moor* (2), *Lewis* v. *Evans* (3), and *Hudson* v. *Louth*. (4)

W. Graham, for the respondent, the town clerk of Colchester.

LORD COLERIDGE, C.J. I am of opinion that the decision in *Childs* v. *Cox* (1), to which I gave a reluctant assent, cannot be supported. Before there was an appeal, this Court did not hesitate to overrule a previous decision, in order to prevent the establishment of bad law. As there is now an appeal, the better course will be to affirm the decision of the revising barrister without costs, giving at the same time leave to appeal.

LAWRANCE and COLLINS, JJ., concurred.

Appeal dismissed without costs; leave to appeal given.

Solicitors for the appellant: *Speechly, Mumford, Landon, & Rodgers, for Prior, Colchester.*

(1) 20 Q. B. D. 290.
(2) Law Rep. 9 C. P. 233.
(3) Law Rep. 10 C. P. 297.
(4) 6 L. R. Ir. 69.

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PALMER *v.* WADE.
WADE *v.* PALMER.

Parliament—Registration—Borough Vote—Occupation of Rateable Dwelling-house not included in Rate—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-ss.* 2, 3; *s.* 26—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 19—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 9, *sub-s.* 2 (*d*); *s.* 32—*Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 9, *sub-s.* 9.

The inhabitant occupier of a dwelling-house, which, though rateable, has not been rated to a poor-rate made during the qualifying period, and in respect of which such rate has not been paid, is not entitled to either the parliamentary or the municipal franchise.

Case stated by the revising barrister for the city of Norwich.

William Arthur Wade objected to the retention of the name of Walter Palmer in Division One of the occupiers' list, as a person entitled to be registered as a parliamentary voter and enrolled as a citizen, on the ground that the qualifying property, described in the fourth column as "4, Newmarket Street," and "Gloucester Street," "had not been rated to the poor or for other purposes during the whole of the qualifying period."

Both houses were in the parish of Norwich. Rates made by the board of guardians pursuant to local Acts had been allowed respectively on August 24, 1892, February 9, 1893, and August 25, 1893. The voter had lived at 4, Newmarket Street, from before July 15, 1892, till December 15, 1892, and at the house in Gloucester Street from December 15, 1892, till after July 15, 1893. The owner of the former house compounded for and paid the rates while the voter lived there, and the voter's name appeared in the rate-book as occupier. The latter house had been built on land of which the owner had not previously had any beneficial occupation, and was not comprised in any rate made before that allowed in August, 1893. It was not the practice of the board to insert new houses in existing rates, or to make supplementary rates in respect of them. No claim to be rated or tender of rates in respect of the house was made

either by the owner or by the voter before August, 1893, and, if it had been rated before then, the rates would have been compounded for by the owner.

The revising barrister held that the voter possessed a parliamentary but not a municipal qualification, and transferred his name, and those of twenty-six other persons whose appeals were consolidated, to Division Two of the list. Both the voter and the objector appealed.

E. Morten, for the voter. The voter is entitled to the parliamentary, if not to the municipal franchise. It is contended that the case falls within sub-s. 9 of s. 9 of the Representation of the People Act, 1884, and s. 19 of the Poor Rate Assessment and Collection Act, 1869. (1)

(1) By the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 3: "Every man shall . . . be entitled to be registered as a voter, and when registered to vote for a member or members to serve in parliament for a borough, who is qualified as follows: (that is to say):—"

* * * *

"(2.) Is on the last (now the 15th) day of July in any year, and has during the whole of the preceding twelve calendar months been an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough; and

"(3.) Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises."

By s. 26: "Different premises occupied in immediate succession by any person as owner or tenant during the twelve calendar months next previous to the last (now the 15th) day of July in any year shall, unless and except as herein is otherwise provided, have the same effect in qualifying such person to vote for a county or borough as a continued occupation of the same premises in the manner herein provided."

By the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 19: "The overseers in making out the poor-rate shall in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid; and if any overseer negligently or wilfully and without reasonable cause omits the name of the occupier of any rateable hereditament from the rate, or negligently or wilfully misstates any name therein, such overseer shall for every such omission or misstatement be liable on summary conviction to a penalty not exceeding two pounds; provided that any occupier whose name has been omitted shall, notwithstanding such omission and that no claim to be rated has been made by him, be entitled to every qualification

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[LAWRANCE, J., referred to *Rogers* v. *Lewis* (1) and *Moger* v. *Escott*. (2)]

Germaine, for the objector. The question has been decided adversely to the voter, in regard to the parliamentary franchise, by the Court of Appeal in Ireland, in *M'Gaffigan* v. *Riddall*. (3)

LORD COLERIDGE, C.J. I was inclined to think that the revising barrister was right as to both matters. But the case of *M'Gaffigan* v. *Riddall* (3), in the Court of Appeal in Ireland, is a clear authority that he was wrong in regard to the parliamentary franchise. The head-note is: "The inhabitant occupier, during the whole or part of the qualifying period, of a dwelling-house which was rateable, and ought to have been rated, but was not rated for the relief of the poor to a rate which was made during the qualifying period, and during his occupation, is not entitled to the franchise." That is simply this case. Fitzgibbon, L.J., in his able and careful judgment, says of

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and franchise depending upon rating, in the same manner as if his name had not been so omitted."

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 9, sub-s. 2: "A person shall not be entitled to be enrolled as a burgess unless he is qualified as follows: . . .

"(*d*) Has been rated in respect of the qualifying property to all poor-rates made during those twelve months (i.e., before July 15) for the parish wherein the property is situate."

Sect. 32: "(1) If an occupier of any qualifying property, whether the landlord is or is not liable to be rated to the poor-rate in respect thereof, claims to be rated to the poor-rate in respect thereof, and pays or tenders to the overseers of the parish where the property is situate the full amount of the poor-rate last made in respect of the property, the overseers shall put the occupier's name on the rate-book in respect of that rate.

"(2.) If they fail to do so, he shall nevertheless for the purposes of this Act be deemed rated to that rate."

By the Representation of the People Act, 1884 (48 Vict. c. 3), s. 9, sub-s. 9: "In any part of the United Kingdom where a man inhabits a dwelling-house in respect of which no person is rated by reason of such dwelling-house belonging to or being occupied on behalf of the Crown, or by reason of any other ground of exemption, such person shall not be disentitled to be registered as a voter and to vote by reason only that no one is rated in respect of such dwelling-house, and that no rates are paid in respect of the same, and it shall be the duty of the persons making out the rate-book or valuation-roll to enter any such dwelling-house as last aforesaid in the rate-book or valuation-roll, together with the name of the inhabitant occupier thereof."

(1) 7 C. B. (N.S.) 29.

(2) Law Rep. 7 C. P. 158.

(3) 28 L. R. Ir. 257.

sub-s. 9 of s. 9 of the Representation of the People Act, 1884: "This enactment seems to me to imply that, except in the case of exempt premises, no one is entitled to be registered in respect of any dwelling-house for which no one is rated and no rates are paid; and it would be unmeaning to require the name of the 'inhabitant occupiers' of 'exempt' premises to be entered on the rate-book, if rating was not in all other cases essential to the franchise." We cannot say that the revising barrister was right as to the parliamentary franchise without overruling this decision, which we are bound to respect. As to the municipal franchise, I think that he was right.

LAWRANCE, J. I am of the same opinion, though, but for the view taken by the Court of Appeal in Ireland in *M'Gaffigan* v. *Riddall* (1), I should have been inclined to agree with the revising barrister.

COLLINS, J. I am of the same opinion for the same reasons.

First appeal dismissed, second allowed.

Solicitors: *Gover & Chiles; English, Norwich.*

(1) 28 L. R. Ir. 257.

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[IN THE COURT OF APPEAL.]

PAPE *v.* WESTACOTT.

Principal and Agent—Authority—Payment to Agent—Payment by Cheque instead of Cash—Auctioneer.

The plaintiff was owner of a house which was let for a term of years subject to a proviso that the lessee should not assign the premises without the plaintiff's written consent. The lessee agreed to assign the term to a purchaser, and applied to the plaintiff for his licence. The plaintiff put the matter into the hands of the defendant, who was an auctioneer and house agent, and gave him a written licence for the lessee to assign, but instructed him not to part with the licence till the lessee had paid the last quarter's rent, which was in arrear. The defendant accordingly met the lessee and the purchaser by appointment to complete the transaction, and accepted from the lessee a cheque drawn to the defendant's order for the amount of the rent in arrear, together with a small sum for the defendant's charges. The defendant then gave up the licence, and the purchase was completed. The lessee's cheque having been dishonoured, the plaintiff brought an action against the defendant for negligence, in departing from his instructions by giving up the licence without receiving the rent in cash:—

Held, that the defendant was liable, and that the measure of damages for which he was liable was the full amount of the arrears of rent.

Bridges v. *Garrett* (Law Rep. 5 C. P. 451) distinguished.

Appeal from the judgment of the Divisional Court (Charles and Vaughan Williams, JJ.) affirming a judgment of the Bloomsbury County Court in favour of the plaintiff.

At the hearing in the county court, it appeared that the plaintiff was the owner of a house in Camden Road which was let on lease to one Caseley, a chemist, for fourteen years. The lease contained a covenant that the lessee would not assign or underlet the demised premises without the written licence or consent of the lessor first had and obtained, which consent should not be unreasonably or arbitrarily withheld to a respectable and responsible tenant. In February, 1891, Caseley contracted to sell his lease and business to a Mr. Auckland, and accordingly applied to the plaintiff for a licence to assign the lease; and references were furnished in the usual way. The plaintiff then placed the matter in the hands of the defendant, who was an

auctioneer and house agent in the neighbourhood, and instructed him to make the usual inquiries into the references, and if they were satisfactory, to prepare the necessary licence. The inquiries were made, and the defendant, being satisfied with the result of them, prepared the licence, which was signed by the plaintiff. An appointment was made for the completion of the purchase at the defendant's office on a day in February, which was a Saturday, at 3 P.M. In the morning of that day the plaintiff's wife observed that Caseley was removing his furniture and goods, and, being anxious respecting the payment of the quarter's rent due on December 25, 1890, which had not been paid, she called on the defendant and told him that the goods were being removed, and on behalf of her husband instructed him not to part with the licence till he got the rent, which the defendant said he would attend to. The plaintiff's wife did not tell the defendant that he was to insist on being paid in cash, or that he was not to take a cheque for the rent.

At the appointed time, the defendant, Caseley, Auckland, and his solicitor, met at the defendant's office, and the purchase was completed. Before this was done, the defendant claimed the quarter's rent—22*l.* 15*s.*—from Caseley, refusing to part with the licence without its being paid. He asked that it should be paid in cash; but neither Caseley nor the purchaser had any cash with them, and the purchaser had brought a cheque payable to Caseley, and filled up for the full amount of the purchase-money. As it was Saturday afternoon, it was impossible to get a cheque cashed at the bankers. Under these circumstances, the defendant consented to receive a cheque from Caseley, and himself drew one for the sum of 25*l.* 9*s.*, being 22*l.* 15*s.* for the quarter's rent, and 2*l.* 14*s.* for his own charges. The cheque was drawn on a plain sheet of paper to the order of the defendant, and crossed "& Co." The defendant then gave up the licence, and the purchaser handed his cheque to Caseley and the purchase was completed. The purchaser and Caseley banked at the same bankers, and the defendant took for granted that the purchaser's cheque, which was for 300*l.*, would be paid in to Caseley's account on Monday morning, so that there would be an ample fund for paying Caseley's cheque. However, Caseley paid away

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the purchaser's cheque to some other creditor, and when his own cheque for 25*l.* 9*s.* was presented at his bankers it was dishonoured, and was never paid. It appeared from the evidence that Caseley was not suspected by any of the parties of being insolvent, and the plaintiff said that, although he had sometimes had difficulty in getting the rent from him on previous occasions, he had always paid it eventually, either in cash or by cheque.

The plaintiff then commenced the present action against the defendant for negligence and acting beyond his authority in giving up the licence without receiving the quarter's rent in cash. The learned judge gave judgment for the plaintiff with 22*l.* 15*s.* damages. The defendant appealed to the Divisional Court, which dismissed the appeal, but gave leave to the defendant to appeal to the Court of Appeal.

A. Powell, for the defendant. There was no negligence on the part of the defendant, since his receipt of the cheque was in the ordinary course of business. The Court relied on the rule stated in Story on Agency, par. 98; but this is qualified by par. 202, which lays down that an agent is not liable if he acts according to the ordinary course of business. In *Russell* v. *Hankey* (1), a banker was held not liable for taking a cheque from the acceptor of a bill in payment of it, though the cheque was afterwards dishonoured. So in *Farrer* v. *Lacy, Hartland & Co.* (2), an auctioneer was held justified in receiving a cheque in payment of the deposit.

Poley, for the plaintiff. *Sykes* v. *Giles* (3) shews that an agent is only authorized to accept payment by cheque where the course of business requires it, and payment in cash is necessary unless there is a custom authorizing payment otherwise. *Williams* v. *Evans* (4) supports the view that payment must be in cash; *Ex parte Powell* (5); Story on Agency, 9th ed., pars. 98, 202. *Russell* v. *Hankey* (1), turned on the custom of trade in the City of London. There is no evidence of any custom for auctioneers to take cheques instead of cash. It is especially

(1) 6 T. R. 12.
(2) 25 Ch. D. 636; 31 Ch. D. 42.
(3) 5 M. & W. 645.
(4) Law Rep. 1 Q. B. 352.
(5) 1 Ch. D. 501.

the duty of an agent to insist upon payment in cash where any property or valuable document passes. In *Farrer* v. *Lacy, Hartland & Co.* (1), no property passed. In the present case the defendant gave up the licence, which was a valuable document, and he was specially instructed not to part with it without payment of the rent: *Sweeting* v. *Pearce.* (2)

With respect to the measure of damages, the plaintiff is entitled to the rent which has been lost by the negligence of the defendant. The rent cannot be recovered from the lessee, who is insolvent. It may be said that the plaintiff might distrain on the goods of the present tenant, Auckland; but the defendant cannot rely on this power of distress in an action between the plaintiff and himself. It is collateral matter, which will not excuse his negligence: Mayne on Damages, 4th ed. p. 102; *Davis* v. *Garrett* (3); *Lilley* v. *Doubleday.* (4)

A. Powell, in reply. As to the measure of damages, there is no evidence of any actual damage. The plaintiff is really in a better position with Auckland, the purchaser, as tenant, than he was before the assignment of the lease; for he can distrain on his goods for the past rent.

[LINDLEY, L.J. Would not the plaintiff be estopped from distraining on the goods of the purchaser after the defendant had in the purchaser's presence accepted Caseley's cheque and given up the licence?]

No; for the purchaser knew that there was no payment till the cheque had been cashed, and, therefore, that the right of distraint still remained: *Davis* v. *Gyde.* (5) No negligence has been proved against the defendant. He did the best for his principal under the circumstances. If he had refused the cheque the completion of the purchase would have been delayed, and might never have taken place. He had no reason to doubt Caseley's solvency; and, moreover, he knew that he had received a cheque for 300*l.* from the purchaser, which he had reason to suppose would be paid in to his account, and would provide ample funds to meet the cheque. The fact of the

(1) 25 Ch. D. 636; 31 Ch. D. 42.
(2) 7 C. B. (N.S.) 449.
(3) 6 Bing. 716.
(4) 7 Q. B. D. 510.
(5) 2 Ad. & E. 623.

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defendant's charges being included in the amount of the cheque did not make it any the less a payment to the plaintiff: *Bridges* v. *Garrett* (1); *Pearson* v. *Scott*. (2) With respect to the custom of receiving payment by cheque, that custom has become much more general of late years, and it is not necessary to prove any special custom with regard to auctioneers or house agents. It is now the ordinary course of business, of which the Court will take judicial notice.

LINDLEY, L.J. This case involves some difficult questions, but when it is carefully thought out the difficulties will be found to vanish. The plaintiff had a house which was let to a person named Caseley upon a lease, which Caseley was not entitled to assign without the consent of the landlord. Caseley was a shopkeeper; he was not a very good tenant, he paid his rent sometimes by cheque, sometimes by cash; he was sometimes in arrear and sometimes not; and he had negotiated for the assignment of his business to a person named Auckland for 300*l*. Auckland appears to have been a better tenant than Caseley, and the plaintiff was not unwilling to accept him. But Caseley owed his landlord a quarter's rent, amounting to 22*l*. 15*s*., and the change was to take place in February. Thereupon the plaintiff goes to the defendant, an estate agent, and asks him to look after this matter for him, and gives the defendant a consent in writing to the transfer of the lease by Caseley to Auckland, and tells the defendant to get in this rent, and not to part with that licence without getting the rent. There is some controversy between the parties as to the extent to which the defendant was put on his guard—some controversy as to whether he was told that Caseley was a person not altogether to be trusted. The evidence of the plaintiff, his wife, and his son on this point is, that the defendant was warned; and the defendant denies it. Now what took place was this. On a Saturday in February, Caseley and Auckland met at the defendant's office. They met for the purpose of Auckland paying Caseley the 300*l*. which he was to pay, and they met also for the purpose of getting this licence to assign.

(1) Law Rep. 5 C. P. 451. (2) 9 Ch. D. 198.

It was after banking hours, and nobody came prepared with any cash. The incoming tenant did not bring 300*l.*, but he brought a cheque. Auckland and Caseley both banked at the same bank, and Auckland gave this cheque to Caseley. Then there was the rent to settle. Caseley had not got the rent which was due, and he proposed to pay by cheque; but the defendant would have preferred cash, and asked for cash. He expected the purchaser to bring cash, and if cash had been brought everything would have gone straight. But, it being after banking hours, and neither of them having cash, the defendant took a cheque from Caseley. That cheque was not a cheque for the rent, nor was it a cheque so drawn that in the ordinary course of business the defendant would have remitted that cheque to the plaintiff. The cheque was a cheque for the rent in arrear plus the defendant's charges, and was made payable to the order of the defendant, and it was crossed in blank. The defendant says he had no reason to suspect that the cheque would not be cashed; he says he had every reason to suppose it would. He knew, as the fact was, that Caseley had been put in funds to the extent of 300*l.* by Auckland's cheque, which, in the ordinary course, would be paid in to Caseley's account, when the smaller cheque would be paid. But when the Monday came the defendant presented his cheque and it was dishonoured, and he could not get the money. What has taken place in addition to these facts is this. Caseley seems to have disappeared, and it is common ground that he cannot pay. Therefore, the plaintiff has lost the rent which it was the business of the estate agent to get before he parted with the licence to assign. On the other hand, Auckland has paid his 300*l.*, taken possession of this shop, and put his furniture and other goods in. The learned county court judge came to the conclusion that the plaintiff was entitled to recover this 22*l.* 15*s.* from the defendant. The learned judge seems to have based his decision upon a passage in Story on Agency, par. 98: "So an agent authorized to receive payment has not an unlimited authority to receive it in any mode which he may choose; but he is ordinarily deemed intrusted with the power to receive it in money only." The learned judge seems to have thought

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that the receipt of this cheque instead of cash was enough to decide the case.

The passage in Story was pressed, I think, by the learned county court judge a little too far. In the same book, at par. 202, that passage which I have read is qualified in this way. The author says: "On the other hand, where the agent has given only the usual credit, or has conducted himself according to the usual course of business, and has employed the usual diligence in his agency, he will not be responsible for any loss occasioned by the subsequent insolvency or fraud of the persons whom he has trusted, or to whom he has sold the property, if at the time of the sale they were in good credit. So if payment is received in the usual manner of conducting the like business transactions, as by receiving a cheque on a bank from a person in good credit who should become insolvent before the cheque could be duly presented, or by receiving the common currency of the country which should afterwards become depreciated; in each of these cases the loss would be the loss of the principal and not that of the agent." If an agent is merely to collect money, taking a cheque from a person having a banking account is not a departure from his authority. That is in the ordinary case of collecting money. If the cheque is not paid the person who gives it can be sued; and in ordinary cases no one is prejudiced by taking a cheque. But it is by no means always within an agent's authority to take a cheque instead of money. Let us take a case that lawyers are familiar with—the sale of real property. Let us take the case of a solicitor who is entrusted by the vendor with the completion of the transaction. Is that solicitor justified by the ordinary course of business or the ordinary habits of men in parting with the conveyance and the title-deeds in exchange for a promise to pay or a cheque? Certainly not. The ordinary course is, I do not say not to take a cheque, but not to part with the deeds until the cheque is paid. Therefore, you cannot say as a general rule that a person who is authorized to receive money is authorized to take a cheque from a person. What is the question which we have to consider? It is this: Was the defendant justified in parting with the licence to assign without getting the rent in arrear? Did he pursue his

authority in getting the piece of paper which he ultimately could not cash? My answer is, that what he did was not in the performance of his duty. He did not get cash. He did not even get a cheque which in his ordinary course of business he would transmit to his principal. He got a cheque payable to himself for the rent in arrear, plus other moneys, and he was the person to get in the amount of the cheque and remit part of such amount to his principal. If that cheque were cashed the cheque itself would be utterly unimportant. But what right had he to part with the licence without getting the rent due? There is no proof of any usage or custom that would authorize such a transaction, and it does appear to me—having regard to the fact that he took a piece of paper which, in the ordinary course, he would not send to his principal at all, and, above all, that that piece of paper was never cashed—he has not pursued the authority with which he was entrusted. It has been said that this is not in accordance with *Bridges* v. *Garrett*. (1) The whole question there turns upon the cheque being cashed; but if it is cashed it is a mere piece of machinery; and when you look at the decision in *Pearson* v. *Scott* (2) you will find that Fry, L.J. (at p. 207), cites with approval a passage from Byles, J.'s, judgment in *Sweeting* v. *Pearce* (3), which I will read. He says: "It is not disputed that the general rule of law is that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash the probability is that he will hand it over to his principal; but if he is allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events, it would much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent as a general rule cannot receive payment in anything else but cash." Then Fry, L.J., says: "Now that, it will be observed, is the precise point here, because the payment alleged is payment by settlement of accounts between the agent and the debtor. Willes, J., puts the same view in shorter language: 'As a general rule, when a person employs an agent to receive a debt, the

(1) Law Rep. 5 C. P. 451. (2) 9 Ch. D. 198.
(3) 7 C. B. (N.S.) 449, 485.

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agent must receive it in money, and it is not sufficient that the debt should be written off against a debt due from such agent.'" Then Fry, L.J., proceeds: "The next case is *Bridges* v. *Garrett* (1), which has caused me considerable anxiety lest I should not give weight to the decision arrived at." Then, after referring to the facts in that case, he says: "The jury had found as a matter of fact that Craig, the deputy-steward, had authority to receive the fee for the lord, and that a crossed cheque was a good payment to the lord within the authority to pay to Craig. They found, therefore, that the payment was actually within the authority, and the short effect of the decision of the Court of Exchequer Chamber is that they thought there was evidence for the jury, and refused to disturb their finding. They thought, moreover, that seeing that the cheque given by the surrenderee was good, and that it was in the ordinary course of business to make payments by cheque, it might be considered that that cheque so given, when cashed, became a payment of cash to the agent. It appears, therefore, to me, that in their opinion that case came within the rule, and that the fact, which probably was unknown to all the parties at the time, that the deputy-steward owed money to his bankers, was immaterial, and that the transaction therefore none the less remained a payment in cash." So here that would be a very important matter: if this cheque had been cashed there would have been no difficulty at all about it. But unfortunately it was not.

I return, therefore, to the question, Did the agent pursue his authority? My answer is, No. Then comes the question, What is the loss? The counsel for the defendant says it is nothing, because the landlord would have had the right to distrain against the incoming tenant. Now, I am clearly of opinion that he could not. It would be perfectly outrageous for us to hold judicially that the landlord could distrain. The incoming tenant is present when the transaction takes place. The landlord says, "I have settled with the outgoing tenant; you can bring your things in." And next day the landlord goes in and distrains! It is neither common sense nor law nor justice. This being so, the consequence is that by the excess of authority

(1) Law Rep. 4 C. P. 580.

the plaintiff has lost his money, and the damages are what might have been obtained if the agent had not parted with the licence to assign. I think, therefore, that it is impossible to disturb this judgment, and that the appeal must be dismissed.

A. L. SMITH, L.J. It seems to me that it is indisputable, though it has been disputed by the counsel at the bar, that the law applicable to a case like the present where a defendant, who is an auctioneer and house-agent, is employed to hand over a licence upon receipt of money, is that, unless he can shew a usage to the contrary, his duty is to receive payment in cash, and by that I mean money. This case differs from that covered by those two sections in Story, which have been referred to, namely, pars. 98 and 202, and also from that covered by the judgment of Byles, J. (1), and approved of by Fry, L.J., in *Pearson* v. *Scott*. (2) This is not a case in which an agent is sent out merely to collect a debt. If his duty was merely to go and collect a debt from a debtor, and he collects it by a cheque which is dishonoured, I do not know that he would have broken his authority, because the creditor would remain in the same position as before. The debtor would not have paid, and the creditor could have pursued the debtor. In the present case, however, the agent was clothed with this authority: "Do not hand over the licence to assign to Caseley, my tenant, who owes me money, until you have got that money out of him." This was the mandate given by the plaintiff to the defendant. Caseley was in arrear. Caseley had found a new tenant, and was willing to assign to him the residue of his lease of the house for 300*l*., but Caseley could not get from his landlord leave to assign to the new tenant until he had paid his arrears of rent, and so it was that the landlord said to the defendant, "Do not hand over my licence to Caseley to assign until you have got the money." Under these circumstances, is there a usage that the agent should receive the money otherwise than in cash—coin of the realm? How can I say that there is? No such evidence was given. But I go further, for I say that there are traces upon the evidence which was given, as appeared upon the judge's notes, that there

(1) Law Rep. 5 C. P. 451. (2) 9 Ch. D. 198, 207.

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A. L. Smith, L.J.

was no such usage. There is evidence that the defendant knew from what had been told him that Caseley at any rate was not a good paymaster. The defendant himself said he had taken a cheque from Caseley, though he objected to that mode of payment. That is evidence clearly against the usage, because if there were a usage, why should the defendant have said—if it be the truth—that he objected to payment by cheque? Therefore, in answer to the question, Has the usage been proved that this payment should have been made to the defendant by cheque? I say, No. It appears to me that the learned county court judge was right, though he did not give his reasons so fully as he might have done, and that the defendant is liable in this action.

Then as to the question of damages. In the first place, it was said Caseley was a man of small means, that he had moved all his furniture on the Saturday morning, and the change took place on Saturday afternoon. The defendant says, "In consequence of my taking the cheque from Caseley and allowing the transfer to take place, the landlord is in a better position now than if the change had not taken place, because the new tenant has goods and the old tenant had none, and the landlord can distrain upon the new tenant." I agree with Lindley, L.J., that if this Court were to allow a distraint upon the new tenant's goods under the circumstances which exist it would be nothing short of monstrous; the new tenant was present at the change, and the old tenant and the defendant were also present at the change, and it seems to me that the true view of that transaction is this—that the landlord's agent intimated to the new tenant by the handing over of that licence to assign that he was satisfied, and that the new tenant might safely come in; and for the landlord now to turn round after that and distrain upon the new tenant would be most unrighteous. It is said that the landlord has lost nothing; but in my judgment the amount of the damage is the amount of rent which was due from Caseley to the landlord. Unless the licence had been handed by the defendant to Caseley, Caseley never would have got 300*l.* at all from the incoming tenant. That was the pressure which the landlord was able to exert over Caseley; but the landlord lost that pressure by what the defendant did. If that

pressure had been kept up, he would have probably got his rent, and when that rent was paid he would have handed over the licence to assign. The full measure of the damages is, therefore, thrown upon the defendant. It seems to me that this judgment must be upheld and the appeal must be dismissed.

DAVEY, L.J. I am of the same opinion. I agree in the general statement of law to the effect that there is no authority for an agent employed to receive money to take anything but cash unless it is in accordance with the ordinary course of business to receive a cheque. In the case which has been referred to —*Russell* v. *Hankey* (1)—the Court thought that there was such a practice in the ordinary course of business; but in the absence of any usage or any ordinary course of business which would justify the agent in taking a cheque, I am of opinion that there was no authority for him to do so. Certainly there was no evidence, and, in my opinion, there could not be evidence that there was any general practice or usage that an agent completing a transaction like this, where an agent is entrusted with the duty of handing over a document of title against payment, should take a cheque. In my opinion the practice goes the other way. In this case, although technically he had no lien upon it, because it was his own property, yet in point of fact the power of withholding the licence was the plaintiff's best security, and when the agent received the licence he got, as he was well aware, the most effectual means of getting the money. But in the present case it is not in my opinion necessary to go so far even as that, because it appears to me, now that we have seen the cheque and that we understand what the facts actually were, that no cheque was in fact ever given to the defendant which belonged to the plaintiff. No payment either in cash or cheque was ever made to the defendant in a form which enabled him to transmit it or hand it over at once to his principal. Against that view we have been pressed with the case of *Bridges* v. *Garrett* (2); but when I ook at that case, I entirely agree with the view taken of it in *Pearson* v. *Scott* (3), that it turns on the fact of the cheque

(1) 6 T. R. 12.

(2) Law Rep. 5 C. P. 451.

(3) 9 Ch. D. 198.

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Davey, L.J.

having been honoured, so as to make it in fact payment in cash You will find that in Cockburn, C.J.'s, judgment, and also in the judgment of Blackburn, J. Cockburn, C.J., says: "There is no doubt that where an agent is authorized to receive money for his principal he cannot allow it by way of set-off in accounts between the payer and himself: he must receive it in money. If, however, payment is made by cheque, and the cheque is duly honoured, that is a payment in cash." So what he rested on was the payment, and not the cheque. And Blackburn, J., says: "Where the person to whom the money is paid stands in the relation of a clerk or servant the payment to him, whether in cash or by a cheque, which is afterwards paid, is a good payment to the principal." So that learned judge also rests his opinion on the fact of the cheque having been honoured. If this is so, there was not in fact payment of any kind for the plaintiff unless and until the cheque was cashed; and if the cheque was never cashed the defendant never received anything which the landlord was entitled to have handed over. On the question of damages I have nothing to add to what has been said by the other members of the Court.

Appeal dismissed.

Solicitors: *Haynes & Claremont; Barraud, Regge, & Jupp.*

M. W.

[IN THE COURT OF APPEAL.]

C. A.
1893
Nov. 24.

SUTTON & CO. *v.* GREY.

Frauds, Statute of (29 *Car.* 2, *c.* 3), *s.* 4—*Guarantee—Oral Agreement to Share Commissions and Losses on Stock Exchange Transactions.*

The plaintiffs, who were stockbrokers, entered into an oral agreement with the defendant that he should introduce clients to them, and that the plaintiffs should transact business on the Stock Exchange for the clients thus introduced, upon the terms that, as between the plaintiffs and the defendant, the defendant should receive half the commission earned by the plaintiffs in respect of any transactions by them for any clients introduced by the defendant, and that he should pay to the plaintiffs half of any loss which might be incurred by them in respect of such transactions. The plaintiffs claimed to recover from the defendant half the loss which they had incurred in Stock Exchange transactions which they had entered into on behalf of one Robertson, who had been introduced to them by the defendant:—

Held, that, the defendant having an interest in the transactions, equally with the plaintiffs, and the main object of the contract being to regulate the terms of the defendant's employment, the principle of *Couturier* v. *Hastie* (8 Ex. 40) applied, and the contract was not within s. 4 of the Statute of Frauds, and the action was maintainable, though the contract was not in writing.

APPEAL by the defendant against the judgment of Bowen, L.J., at the trial of the action without a jury.

The plaintiffs were stockbrokers and members of the London Stock Exchange. The defendant was not a member of the Stock Exchange. The plaintiffs had, as they alleged in their statement of claim, in January, 1891, entered into an oral agreement with the defendant that he should introduce clients to them, and that they should transact business on the Stock Exchange for the clients thus introduced, upon the terms, as between the plaintiffs and the defendant, that he should receive one half the commission earned by the plaintiffs in respect of any transactions by them for and on behalf of such clients as were introduced by the defendant, and that the defendant should pay to the plaintiffs one half of any loss which might be incurred by the plaintiffs in respect of those transactions.

The plaintiffs claimed from the defendant half the loss which they had incurred in Stock Exchange transactions which they

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had entered into on behalf of a client named Robertson, who had been introduced to them by the defendant in pursuance of the oral agreement.

By his statement of defence, the defendant pleaded that s. 4 of the Statute of Frauds had not been complied with; that the contract alleged by the plaintiffs was, within the meaning of s. 4 of the Statute of Frauds (29 Car. 2, c. 3), "a special promise to answer for the debt of another person"; and that, consequently, as it was not in writing, an action upon it could not be maintained.

Stevenson, for the defendant. The effect of the judgment of Bowen, L.J., is to extend the principle of the decision in *Couturier* v. *Hastie*. (1)

[KAY, L.J., referred to *Walker* v. *Hirsch*. (2)]

The only cases which are excepted from s. 4 of the Statute of Frauds are contracts of indemnity; transactions in the nature of a sale, when a guarantee is part of the price; and cases in which a person gives up a security or is to pay out of a particular fund. The present case is not within any of these exceptions, and s. 4 applies: *Fitzgerald* v. *Dressler* (3); *Thomas* v. *Williams* (4); *Castling* v. *Aubert* (5); *Williams* v. *Leper* (6); *Wickham* v. *Wickham* (7); *Mallet* v. *Bateman*. (8)

[KAY, L.J., referred to *Fleet* v. *Murton*. (9)]

In *Wickham* v. *Wickham* (7), Wood, V.C., evidently thought that *Couturier* v. *Hastie* (1) was the furthest extension of the exceptions from s. 4, and that they should not be extended any further.

Rufus Isaacs, for the plaintiffs, was not called upon.

LORD ESHER, M.R. In my opinion this appeal should be dismissed. I think that the judgment of Bowen, L.J., was in every respect right. I do not think that the relation between the plaintiffs and the defendant was that of partnership. They had no intention to become partners, and, as the law now stands,

(1) 8 Ex. 40.
(2) 27 Ch. D. 460.
(3) 7 C. B. (N.S.) 374.
(4) 10 B. & C. 664.
(5) 2 East, 324.
(6) 3 Burr. 1886.
(7) 2 K. & J. 478.
(8) Law Rep. 1 C. P. 163.
(9) Law Rep. 7 Q. B. 126, 132.

a partnership cannot be constituted without such an intention. In my opinion the true relation between the plaintiffs and the defendant was this: The plaintiffs being brokers upon the Stock Exchange, of which the defendant was not a member, they agreed together that the plaintiffs should carry out transactions upon the Stock Exchange for the mutual benefit of themselves and the defendant. The defendant could not himself transact business upon the Stock Exchange, and the plaintiffs made this arrangement with him: "If you will find persons who wish to operate upon the Stock Exchange and will introduce them to us as clients, we will, on behalf of the persons whom you thus introduce to us, transact the ordinary business of a broker on the Stock Exchange, and make ourselves personally responsible according to its rules on these terms—that our brokers' commission on the Stock Exchange shall be divided between us and you, just as if you were our partner and a member of the Stock Exchange, and that, if there should be a loss in respect of the transactions, you shall indemnify us against half the loss." The defendant verbally agreed to this, but there was not any contract or memorandum in writing. The contract, in my opinion, is one which regulated the part which the defendant was to take in the transactions which were contemplated, and, if he was to be an agent for the plaintiffs, the contract regulated the terms of his agency. Again, before the transactions were entered into, the terms were regulated by the agreement, and they were such as to give the defendant an interest in the transactions. The transactions were to be entered into by the plaintiffs partly for their own benefit and partly for the benefit of the defendant. Is such a contract a simple contract of guarantee—"a special promise to answer for the debt or default of another person"—so as to bring the case within s. 4 of the Statute of Frauds, or is it a contract of indemnity? Whether any contract is the one or the other is often a very nice question. But certain tests have been laid down to guide the Court in determining under which head any particular contract comes. The principal case in English law which affords such a guide is *Couturier* v. *Hastie*. (1) In that case a test was given by Parke, B., who delivered the

(1) 8 Ex. 40.

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judgment of himself and Alderson, B. (from whom Pollock, C.B., differed as to the construction of the contract). The learned judge said (at p. 55): "The other and only remaining point is, whether the defendants are responsible by reason of their charging a del credere commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless, if they had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale" (I would read that "totally unconnected with the transaction") "they would not be liable without a note in writing signed by them; but, being the agents to negotiate the sale" (that is, as I read it, "being connected with the transaction"), "the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all questions whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and, though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given." There the test given is, whether the defendant is interested in the transaction, either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, and s. 4 does not apply. The rule thus laid down has been adopted as a test in subsequent cases. In *Fitzgerald* v. *Dressler* (1), Cockburn, C.J., said (at p. 392): "The law upon this subject is, I think, correctly stated in the notes to *Forth* v. *Stanton* (2), where the learned editor thus sums up the result of the authorities—'There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be that the

(1) 7 C. B. (N.S.) 374. (2) 1 Wms. Saund. 211 e.

question whether each particular case comes within this clause of the statute (s. 4) or not depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property, it being, as I think, truly stated there as the result of the authorities, that if there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking. I, therefore, agree with my learned brothers that this case is not within the Statute of Frauds." The learned judge there used the words, "has himself no interest in the property which is the subject of the undertaking," because he was dealing with a case of property; but if his words be read, as I think they should be, "has no interest in the transaction," he is adopting that interpretation of *Couturier* v. *Hastie* (1) which I think is the right one. Then again, in *Fleet* v. *Murton* (2), Blackburn, J., quotes the passage which I have read from the judgment of Parke, B., in *Couturier* v. *Hastie* (1), and thus interprets it: "He says that it is neither a guaranteeing nor a contract for sale, and that consequently the Statute of Frauds is out of the question. It seems to me, therefore, as Mr. Cohen said, that this custom must be taken as merely regulating the

Lord Esher, M.R.

(1) 8 Ex. 40. (2) Law Rep. 7 Q. B. at p. 133.

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terms of the employment." If in the present case the agreement is taken as regulating the terms of the defendant's employment, it is not within s. 4 of the statute; on the other hand, if the transaction is looked at as entered into partly for the benefit of the plaintiffs and partly for the benefit of the defendant, it comes within the rule laid down by Parke, B., in *Couturier* v. *Hastie* (1), and adopted by Cockburn, C.J., in *Fitzgerald* v. *Dressler*. (2) The contract is not a guarantee with regard to a matter in which the defendant has no interest except by virtue of the guarantee; it is an indemnity with regard to a transaction in which the defendant has an interest equally with the plaintiffs. In my opinion, Bowen, L.J., was right in holding that the agreement is not within the statute, and his decision ought to be affirmed.

LOPES, L.J. I am of the same opinion. Bowen, L.J., has adopted the view of the plaintiffs, that the contract was one of indemnity, and I think he was right in so holding. The defendant says that the contract amounts to "a special promise to answer for the debt or default of another person," and is therefore within the statute. The true test, as derived from the cases, is, as the Master of the Rolls has already said, to see whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise. In the former case, the agreement is within the statute; in the latter, it is not. In the present case it appears to me beyond all question that the defendant had an independent interest in the transaction, because it was entered into for the mutual benefit of the plaintiffs and himself. In another view, the contract was to regulate the terms of the defendant's employment by the plaintiffs. In my opinion, the decision of Bowen, L.J., was right, and the appeal must be dismissed.

KAY, L.J. According to the report which I have of the judgment of Bowen, L.J., he said, "I have come to the conclusion

(1) 8 Ex. 40. (2) 7 C. B. (N.S.) 374.

that the plaintiffs are correct in saying that it was arranged between them and the defendant that he should contribute to any loss that might occur to them upon Robertson's transactions." I agree that this arrangement hardly comes up to a partnership, though it is very near it. The commission received in respect of any transaction might not be all clear profit; the expenses of the office establishment would have to be provided for; and therefore the contract with the defendant was not that he should share the profit whatever it might be. On the whole I think it would be going too far to say that the contract was that the defendant should share in the profits and losses of the transactions. But then comes in the principle of the decision, that a contract to employ a del credere agent is not within the statute and need not be in writing, because its main object is to regulate the terms of the agent's employment, and, though in the result the agent may have to indemnify the principal against losses, that is not the main object of the contract. The present case, however, is not strictly that of a del credere agent, and the question is, whether the exception from the statute which has been established in the case of a del credere agent applies to the present case. I cannot see any difficulty in holding that it does, when I look at the reasons given by Parke, B., for the decision in *Couturier* v. *Hastie*. (1) When a man simply agrees to assume liability for the debt of another, he has no interest whatever in the transaction, except by virtue of the guarantee. In the present case the defendant had an independent interest in the transactions. Another distinction is this, that the contract is one which regulated the terms upon which the defendant was to be employed by the plaintiffs. I agree with Bowen, L.J., that "this is really a contract which regulates the terms of the agency, and the defendant's liability to answer for the debt of another is only an ulterior consequence of the terms in which the contract is framed." I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Harold A. Farman; Eldred & Bignold.*

(1) 8 Ex. 40.

W. L. C.

C. A.
1893
Nov. 24.

[IN THE COURT OF APPEAL.]

KEEN *v.* HENRY.

Negligence—Cab—Negligence of Driver—Liability of Registered Proprietor—London Hackney Carriages Act, 1843 (6 & 7 *Vict.* c. 86).

Under the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), so far as the public is concerned, the registered proprietor of a hackney carriage is responsible for the acts of the driver whilst he is plying for hire, as if the relationship of master and servant existed between them, even though it does not in fact exist.

King v. *Spurr* (8 Q. B. D. 104) must be taken to have been overruled by *King* v. *London Improved Cab Co.* (23 Q. B. D. 281).

Application by the defendant for judgment or a new trial of the action which was tried before Lawrance, J., with a jury.

The plaintiff and the defendant were both cab proprietors. The action was to recover damages for injuries done to a mare belonging to the plaintiff by reason of the shaft of a cab belonging to the defendant being violently forced into her side, in consequence, as was alleged, of the negligence of a man named Posford, who was driving the defendant's cab. The mare shortly afterwards died. The defendant was the registered proprietor of the cab, and his name was painted on it. The defence was that the defendant was not liable, because Posford was not his servant. The accident happened on March 16, 1893. On January 2, 1893, the defendant had entered into an agreement in writing with his son, which contained a recital that the son was desirous of renting the cab, for a term of three months weekly, without horses or harness, for the purpose of working by attaching thereto his own horse or horses. And it was thereby mutually agreed that the owner should let, and the hirer should take, the cab at a weekly rent of 7*s.*, payable in advance upon each successive Monday during the continuance of the hiring. And whereas the hirer, or his servant or servants, would have the sole charge and custody of the cab during the continuance of the hiring, it was thereby agreed that he should indemnify and keep indemnified the owner from and against all risks, claims, or loss arising from accident occurring to or caused

by the cab, or against all claims for injuries to life, limb, or property arising from the carelessness or wilful misbehaviour of the hirer, or his servant or servants.

Posford, the driver of the cab, was engaged by the son, not by the defendant, and it was contended that the defendant was not liable for the driver's negligence because he was not his master.

The jury found that the accident was caused by the negligent driving of Posford, and assessed the damages at 25*l.*

The learned judge held that, by virtue of the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), the registered proprietor of the cab was liable to the public for the negligence of the driver, even though the relation of master and servant did not in fact exist between him and the driver, and that *King* v. *Spurr* (1) had been overruled by the Court of Appeal in *King* v. *London Improved Cab Co.* (2). Judgment was accordingly entered for the plaintiff for 25*l.*

Rose-Innes, for the defendant. The driver of the cab was not the servant of the defendant, and the defendant had no control over him. The defendant is, therefore, not liable for his negligence. This would be clearly so at common law, and the Act 6 & 7 Vict. c. 86, has made no difference: *King* v. *Spurr.* (1) That case cannot be distinguished from the present. It is distinguishable from *King* v. *London Improved Cab Co.* (2), and has not been overruled by it. In *King* v. *London Improved Cab Co.* (2) the defendants were the registered proprietors of the cab and also the owners of the horse, and they let both the cab and the horse directly to the driver, and, therefore, selected him.

W. E. Hume Williams, for the plaintiff, was not called upon.

LORD ESHER, M.R. It seems to me that the decision in *King* v. *London Improved Cab Co.* (2) interpreted the Act of 1843 as having this effect—that when the driver of a hackney carriage in London does an act which under the ordinary law would give a right of action against his master, in the ordinary sense of that word, an action can now be maintained against the registered proprietor of the hackney carriage, even although the

(1) 8 Q. B. D. 104. (2) 23 Q. B. D. 281.

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driver is not according to ordinary law his servant. That, in my opinion, is the meaning of that decision. If, therefore, the driver of a hackney carriage does that which amounts to a breach of contract with a person who hires the carriage—for instance, if he loses his luggage—the owner of the luggage can maintain an action for damages against the registered proprietor of the carriage, although the driver was not his servant. This was decided in *Powles* v. *Hider*. (1) The same principle was applied in *Venables* v. *Smith* (2) to an action against the registered proprietor of a cab for personal injury caused to one of the public by the negligence of the driver. These two cases and *King* v. *Spurr* (3), were considered by this Court in *King* v. *London Improved Cab Co.* (4), and we had then to determine whether we would adopt the ruling in *Powles* v. *Hider* (1) and *Venables* v. *Smith* (2) in its full sense. It appears to me that this Court did then adopt the ruling in those cases in its full sense, and held that the true interpretation of the Act is that which I have already stated. That being so, how does the present case stand? The driver of the defendant's cab by his negligent driving caused an injury to the plaintiff's mare, which resulted in her death. If the driver had been the servant of the defendant his negligence would at common law have given the plaintiff a right of action against the defendant. It follows that in such a case the Act gives the plaintiff a right of action against the defendant, although the driver is not his servant. This right, however, does not interfere with any right of action which the plaintiff may have at common law against the driver's master in the ordinary sense of that word. If the defendant's son were really the driver's master, the plaintiff could have brought an action against him in respect of the injury. But under the Act he is entitled also to bring an action against the registered proprietor of the cab, and the fact that he can do so in no way militates against his right of action against the defendant's son. The proprietors of hackney carriages cannot by letting their carriages escape from their liability under the statute.

(1) 6 E. & B. 207.
(2) 2 Q. B. D. 279.
(3) 8 Q. B. D. 104.
(4) 23 Q. B. D. 281.

LOPES, L.J. In my view this case is undistinguishable from *King* v. *London Improved Cab Co.* (1), in which this Court carefully considered the Act and the previous decisions upon it. I adhere to what I then said (2)—viz., "The question turns on the true construction of 6 & 7 Vict. c. 86, and that, in my opinion, puts the driver, so far as regards the public, in the position of servant, and the proprietor in the position of master, with the liabilities that attach to that position." I do not for a moment mean to say that an action could not be maintained in the alternative against the driver's real master. But the Act enables an action to be brought against the registered proprietor of the cab, if it is thought desirable to do so.

KAY, L.J. I, also, am unable to distinguish the present case from *King* v. *London Improved Cab Co.* (1) I have formed no opinion as to the correctness of that decision, and, if I had, I should not be entitled to express it, for it is a decision of this Court, and I am bound by it. In the present case the registered proprietor of a cab has let it to his son; the son provided the driver, and also the horse and the harness. That was not so in *King* v. *London Improved Cab Co.* (1), for there the proprietor himself made an arrangement with the driver for letting the cab to him. But the decision of the Court was, that, in the interest of the public, the Act had made it unnecessary to consider the nature of the relation between the proprietor of the cab and the driver, and had rendered the proprietor liable in case, through the negligence of the driver, an injury should be done to one of the public. If that be so, the decision exactly covers the present case. The plaintiff, whose mare has been killed, has nothing to do with the relation between the proprietor and the driver; but, whatever that relation may be, he is entitled to look to the proprietor for an indemnity. It is said, indeed, that *King* v. *London Improved Cab Co.* (1) is distinguishable from *King* v. *Spurr* (3), and that the latter case has not been overruled. When I look at the two cases, it seems to me impossible to say that *King* v. *Spurr* (3) has not been overruled. Lindley, L.J., did,

(1) 23 Q. B. D. 281. (2) 23 Q. B. D. at p. 284.
(3) 8 Q. B. D. 104.

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indeed, in *King* v. *London Improved Cab Co.* (1), suggest that *King* v. *Spurr* (2) might be distinguishable, "though the distinction may not be a very broad one, for there the cab only was hired by the driver, and the horse was his property." But it is evident that the Lord Justice did not think the distinction a sound one. In my opinion, *King* v. *Spurr* (2) was overruled by *King* v. *London Improved Cab Co.* (3) This appeal must be dismissed.

LORD ESHER, M.R. It must be understood that we are all of opinion that *King* v. *Spurr* (2) has been overruled.

Appeal dismissed.

Solicitors: *H. W. Davie; H. Pumfrey.*

W. L. C.

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Nov. 3, 4.

BAKEWELL *v.* DAVIS.

Adulteration—Food and Drugs—Certificate of Analysis, Sufficiency of—Unauthorized Addition to Certificate—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 18.

The certificate given by a public analyst of the result of an analysis made by him under the Sale of Food and Drugs Act, 1875, need not set out the constituent parts of the sample analysed, where the case is not one of adulteration; it need only state the "result" of the analysis.

The "observations" which, in the form of certificate given in the schedule to the Act, follow after the result of the analysis are only to be made where the case is one of adulteration; but the addition, in cases where adulteration is not charged, of "observations" amounting only to an expression of opinion on the part of the analyst and not to a finding of fact, although unauthorized and improper, will not necessarily vitiate the certificate.

CASE stated by justices for the city of Birmingham.

An information was preferred by the respondent against the appellant under the Sale of Food and Drugs Act, 1879, charging that the respondent had on April 6, 1893, at the place of delivery, procured a sample of milk then in course of delivery from the appellant to the purchasers or consignees thereof in pursuance

(1) 23 Q. B. D. at p. 284. (2) 8 Q. B. D. 104.
(3) 23 Q. B. D. 281.

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of a contract for the sale to them of such milk, and, suspecting the same to have been sold contrary to the provisions of the Sale of Food and Drugs Act, 1875, had submitted the sample to be analysed, and that the sample was found by the public analyst to be not of the nature, substance, and quality of the article demanded, the said milk containing twenty-two per cent. of fat less than natural, and having been sold and consigned by the appellant to the prejudice of the purchasers, contrary, &c., and a summons in accordance with the information was issued against the appellant.

Upon the hearing it was proved that the respondent, a police constable and inspector of nuisances, had at the railway station, the place of delivery, procured a sample from a churn of milk in course of delivery from the appellant to the North Staffordshire Dairy Company, the consignees, in pursuance of a contract for the sale of the milk. On the label attached to the churn were the words, "The contents of this churn are warranted to be new and pure milk," followed by the appellant's signature. A portion of the sample was submitted to the public analyst, who gave a certificate that the milk contained "twenty-two per cent. of fat less than natural," to which, in the portion of the certificate set apart for "observations," he added the following: "The abstraction of fat is a fraud, and may possibly be injurious to health. No change had taken place in the constitution of the article that would interfere with the analysis."

The public analyst stated in his evidence that the analysis was carried out under his supervision; that he was not present during the progress of some of the processes, but that the weighing of the parts and other material operations had been done by him or in his presence, and he gave evidence as to the constituent parts of the sample of milk. He stated that pure milk should contain at least 3·5 per cent. of fat, and that milk in which the percentage was less than 3 per cent. was a fraudulent milk, and that the sample analysed contained only 2·69 per cent. of fat. He admitted that from the dryness of the season, poor feeding, careless milking, or other causes the fat in milk from one cow might fall below the natural percentage, and that in one case he had known a cow yield milk containing only

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2·6 per cent. of fat. He stated that milk of the quality of the sample did not contain the nutritive and other useful ingredients to which a purchaser was entitled, and as food for infants would be positively prejudicial. He admitted that no water had been added to the milk, and also that it had not been adulterated by the addition of foreign ingredients or materials.

The appellant gave evidence, and called witnesses, all of whom stated that no cream had been taken from the milk, and also called an analyst who had analysed a portion of the sample, and who stated that in his opinion the milk was genuine but poor, and that its condition arose from natural causes; he also said that he had known milk from a single cow to be as poor as the milk in question.

The appellant contended—(1.) That the analysis required by the Act of 1875 must be made by the analyst personally, and that an analysis so made was a condition precedent to prosecution. (2.) That the certificate was invalid (*a*) on the ground that it did not set out the parts of the sample, that is, the constituent parts of the milk analysed; (*b*) on the ground that the insertion of the words "The abstraction of fat is a fraud and may possibly be injurious to health" under the head of "observations" was wrong and calculated to prejudice the defence, because they assumed that there had been an "abstraction." (3.) That the summons was bad under s. 10 of the Sale of Food and Drugs Amendment Act, 1879, in that it did not sufficiently set forth the particulars of the alleged offence. (4.) That the milk was in fact genuine, and that the absence of fat arose from causes for which the respondent was not criminally responsible. (5.) That if the certificate was invalid it could not be cured by the analyst being called and giving supplemental oral evidence.

The justices were of opinion (1.) that the public analyst had analysed the sample within the meaning of the Act; (2.) that the certificate sufficiently complied with the statutory form; (3.) that the particulars of the offence were sufficiently stated in the summons; (4.) that the appellant himself did not know that there was anything wrong with the milk, but that he did not prove that the milk was genuine or that the absence of fat arose from natural causes. They, therefore, overruled the contentions

of the appellant, and found as facts that the milk was not of the nature, substance, and quality of the article demanded, and that it had been sold and consigned by the appellant under a contract of sale to the prejudice of the purchaser, and convicted the appellant.

The points of law for the opinion of the Court were :—

1. Was the analysis properly and legally made "by the public analyst" within the meaning of the Sale of Food and Drugs Act, 1875?

2. Was the certificate of analysis sufficiently in the form required by the Act, was it valid in form, and could it legally be received as evidence?

3. Did the insertion of the words "The abstraction of fat is a fraud and may possibly be injurious to health" invalidate the certificate?

4. Was the summons bad?

5. If the certificate was invalid, was every defect cured by the analyst being called on the hearing of the summons and by the evidence which he gave? (1)

Poland, Q.C. (*William Wills*, with him), for the appellant. The conviction is bad. It is a condition precedent to the validity of proceedings under the Act of 1875 that the public analyst should give a certificate substantially in accordance with

(1) The form of certificate given in the schedule to the Sale of Food and Drugs Act, 1875, so far as is material to the present case, is as follows :—

"I, the undersigned, public analyst for the ———, do hereby certify that I received on the ——— day of ———, 18—, from ———, a sample of ——— for analysis (which then weighed ———), and have analysed the same, and declare the result of my analysis to be as follows :—

"I am of opinion that the same is a sample of genuine ———

or,

"I am of opinion that the said sample contained the parts as under, or the percentages of foreign ingredients as under.

———————————————

———————————————

Observations.§

———————————————

"§ Here the analyst may insert at his discretion his opinion as to whether the mixture (if any) was for the purpose of rendering the article portable or palatable, or of preserving it, or of improving the appearance, or was unavoidable, and may state whether in excess of what is ordinary, or otherwise, and whether the ingredients or materials mixed are or are not injurious to health."

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the form of certificate given in the schedule to that Act; this certificate is defective. It should, as is apparent from the form given, state the "parts" contained in the sample analysed, i.e., the amount of water, solids, fat, &c., whereas it merely states that the sample contains twenty-two per cent. less fat than natural, which is quite indefinite, there being nothing to shew what is the natural percentage of fat. The summons is likewise bad, for it does not sufficiently state the particulars of the offence charged, as required by s. 10 of the Act of 1879, but merely states it in the language of the certificate. It is not sufficient that the sample should merely be deficient in fat as compared with normal milk: *Lane* v. *Collins*. (1) The analyst should have been present himself during all the processes of the analysis.

[He also cited *Barnes* v. *Chipp* (2); *Rouch* v. *Hall* (3); *Barnes* v. *Rider*. (4)]

Jelf, Q.C. (*W. Graham*, and *Hugo Young*, with him), for the respondent. [He was directed to confine his argument to the question of the form of the certificate.] The certificate sufficiently complies with the statutory form. By s. 13 of the Act of 1875, the analyst is merely required to specify the result of his analysis, not the processes of reasoning by which he has arrived at it. By s. 20, proceedings may be taken for the recovery of a penalty after the analyst has given a certificate of the result from which it may appear that an offence has been committed; those are the only essentials to be complied with before taking proceedings. The result of the analysis in the present case was that the sample contained, as stated in the certificate, a certain percentage of fat less than natural; the certificate would have been clearly good had it said that there was no fat in the sample, and it cannot be bad merely because it says, as the fact was, that the sample contained some fat. It is unnecessary to set out the parts, it not being a case of adulteration.

[CHARLES, J. The words as to "foreign ingredients" following the second "or" in the certificate clearly relate only to cases

(1) 14 Q. B. D. 193.
(2) 3 Ex. D. 176.
(3) 6 Q. B. D. 17.
(4) 62 L. J. M. C. 25.

of adulteration; why should not the preceding words between the first and second "or" be limited in a similar manner ?]

It is contended that they do relate to cases of adulteration only; and that being so, the analyst has in such a case as the present merely to certify the "result" of his analysis, which he has done.

William Wills, in reply. The remarks as to abstraction under the head of "observations" are unauthorized in proceedings under s. 6, and vitiate the certificate; they amount to a finding by the analyst that there has been an abstraction, whereas the fact of abstraction is one for the tribunal which hears the case, and not for the analyst. By s. 21 of the Act the production of the certificate is made sufficient evidence of the facts therein stated, unless the defendant requires the analyst to be called as a witness; the defendant is, however, rarely in a position to require this, and the insertion of such a finding in the certificate would certainly prejudice his case and frequently conclude it against him. Abstraction is dealt with by s. 9, and the effect of the observations in this certificate is that the appellant has practically been convicted of an offence under that section, and not under s. 6.

CHARLES, J. I am of opinion that this conviction was right. The only point which it is necessary for us to decide arises upon the form of the certificate given by the analyst under the Act of 1875. It is clear that the offence with which the appellant was charged was an offence under s. 6 of that Act, and it is contended that the certificate given by the public analyst was not the same or to the like effect as the form given in the schedule to that Act, which by s. 18 it must necessarily be. The certificate given in this case states the nature and weight of the sample, and then states the result of the analysis in these words, "twenty-two per cent. of fat less than natural"; then under the heading "observations" comes a statement that the abstraction of fat is a fraud, and may possibly be injurious to health. Upon carefully considering the form of certificate given in the schedule, I notice that the "observations" are only to be made where the case is one of adulteration, and that they are not to be made in such

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a case as the present, where adulteration is not suggested. This is clear from the note printed at the foot of the certificate, which itself has the force of a statutory enactment, and the observations of the public analyst in the present case are therefore unauthorized, and ought not to have been made.

I feel considerable difficulty, however, upon the question whether these unauthorized observations invalidate the certificate. It is contended on behalf of the appellant that they do, inasmuch as serious consequences might result from such an addition, because by s. 21 the certificate is made sufficient evidence of the facts charged, and the facts stated in the certificate must, therefore, be taken to be true unless the analyst is called as a witness to explain his certificate—a course which a defendant in such cases is as a rule not in a position to take; the certificate therefore, it is contended, fastens on the appellant a charge of abstraction of fat from the milk which he is powerless to rebut. It is to be observed, however, in the present case, that the justices have entirely acquitted the appellant of having knowingly been guilty of any wrong act, and he is therefore absolutely free from all blame of any charge that could be brought under s. 9 of the Act of 1875. But though that is so, if I could arrive at the conclusion that the observations in the certificate were a statement of fact, I should agree with the appellant's contention. I cannot, however, bring myself to that conclusion. Even if we reject the word "observations" from the certificate, the addition still remains a statement of opinion, not of fact, upon which the justices would not act. The question then is, Is this certificate invalid because it contains an unauthorized addition? And I feel compelled to say that it is not. I feel the hardship of this decision; but I am unable to come to the conclusion that the existence of this addition makes the certificate any less in accordance with the form given in the schedule.

I come now to the other point, whether this certificate is in accordance with the form in the schedule. I think that it is. The second alternative—that is, percentages of foreign ingredients—is clearly applicable only to cases of adulteration. Why should the first alternative—that is, parts as under—have a

more extended application? It is contended, I think correctly, that the language of this portion of the certificate should be read as "parts of foreign ingredients as under, or percentages of foreign ingredients as under." In my judgment, it would be to apply the first alternative in the certificate—that is, the words "parts as under"—to a wrong subject-matter, if we are to suppose that the analyst must set out the parts of the sample analysed where the case is not one of adulteration, but falls short of it. Taking that to be the true view of the intention of the certificate as given in the schedule, the present certificate seems to be good. It reports accurately the result of the analysis, as the analyst is required to do by s. 13; while the use of the word "result" in s. 20 shews that the result was that which the legislature regards as of primary importance in such cases; in the present instance the result was that the sample contained 22 per cent. of fat less than was natural. It is not intended that the Court should consider how the result is arrived at: the result itself is the important factor. The proper course for the analyst to adopt is to write down the result of his analysis, and, that being done, his certificate would be a certificate of such result from which it might appear that an offence against the Act had been committed. I think, therefore, that this certificate was not invalid, and that the conviction must be affirmed; but I come to this conclusion with regret.

WRIGHT, J. I am of the same opinion. The case raises two questions of some importance. The first is, in what form the certificate of the analyst should be drawn up where the case is not one of adulteration. Upon consideration, I think that the proper construction of the form of the certificate given in the schedule is that after the first "or" the analyst should insert the result of his analysis; that the words which follow only have reference to cases of adulteration, and that only in those cases is it material or relevant for the analyst to state the parts contained in the sample analysed.

The second point raised has regard to the propriety of the addition by the analyst of inferences of fact which are not the results of his analysis. In my opinion, the insertion of the

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finding or inference as to abstraction in the present certificate was erroneous, and likely to prejudice the case. Such a finding should not be inserted; but its insertion is not, in my opinion, sufficient to invalidate the conviction.

Judgment for the respondent.

Solicitors for appellant: *Burton, Yeates, & Hart, for Johnson, Barclay, Johnson, & Rogers, Birmingham.*

Solicitors for respondent: *Sharpe, Parker & Co., for E. O. Smith, Town Clerk, Birmingham.*

W. J. B.

1893 *Dec.* 18.

1894 *Jan.* 20.

JAMES *v.* JONES.

Adulteration—Food and Drugs—Baking Powder—Article of Food—Mixture of with Ingredient injurious to Health—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 3.

By s. 3 of the Sale of Food and Drugs Act, 1875, it is enacted that: "No person shall mix any article of food with any ingredient or material so as to render the article injurious to health with intent that the same may be sold in that state, and no person shall sell any such article so mixed under a penalty."

The appellant sold to the respondent a packet of baking-powder composed of 20 per cent. of bicarbonate of soda, 40 per cent. of ground rice, and 40 per cent. of alum, the latter of which ingredients is injurious to health:—

Held, that such baking powder was not an article of food, and that the sale of it was not an offence, within the above section.

CASE stated by the quarter sessions of Glamorganshire.

On February 15, 1893, the appellant was convicted by justices of the petty sessional division of Pontypridd, in the county of Glamorgan, for having on December 10, 1892, unlawfully sold to the respondent, an inspector under the Sale of Food and Drugs Act, 1875, a certain article of food, to wit, baking powder, which was mixed with a certain ingredient, to wit, alum, injurious to health, contrary to the provisions of s. 3 of the said Act. The appellant appealed to the quarter sessions. Upon the hearing of the appeal the following facts were proved:—

On December 10, 1892, the appellant sold to the respondent a packet of baking powder, weighing about one ounce, for the

price of one penny. It was described on the outside of the wrapper as "Excelsior Baking Powder, for making light and wholesome pastry, puddings, &c., without yeast."

The said baking powder was composed of the following ingredients in the following proportions:—

1. Bicarbonate of soda . . . 20 per cent.
2. Alum . . . . . 40 per cent.
3. Ground rice . . . . . 40 per cent.

Baking powder designated "Excelsior," composed of the parts above stated, has been sold for many years, and is used exclusively in the process of making bread, cakes, and pastry.

In order to cause the mixture of flour and water of which bread, cakes, and pastry are composed to rise and so to become light and digestible when baked, it is necessary that a certain quantity of carbonic acid gas should be generated and diffused through the dough, which is of an elastic nature, and such carbonic acid gas by permeating through it causes it to expand, and so brings about the process of rising which renders the cakes, bread, or pastry when baked light and digestible. The gas may be evolved by the growth of yeast or from baking powder. Bicarbonate of soda is contained in the baking powder, and carbonic acid gas is contained in the bicarbonate of soda. In order to properly liberate this gas and cause it to permeate the dough, there must be a chemical combination of an acid of some kind with the bicarbonate of soda, which substances, when dissolved in water or in the moisture of the dough produced by water, combine, and the requisite liberation of the carbonic acid gas is thereby effected. It is not necessary to use alum in baking powders. Other acids which are not injurious to health are largely used in commerce for this purpose. The acid used in the best-known baking powders is tartaric acid, which is not injurious to health. This acid is sold at a much higher price than alum. It is immaterial to the result whether the substances are dissolved simultaneously or successively. The ground rice is added to the bicarbonate of soda and alum for the purpose of preserving the compound from injury by damp, and preventing chemical combination before actual use in dough. The ground rice is not otherwise an essential ingredient in baking powder.

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It does not pass off with the carbonic acid gas, but remains with the alum (now in the form of hydrate of alumina) (1) in the bread, and both pass into the human system. Three pounds of flour kneaded with water and a sufficient quantity of the baking powder will yield about four pounds of bread. For this purpose about 360 grains of the baking powder would be used, of which four-tenths would be alum. The reaction or mutual action between the alum and the bicarbonate of soda produces hydrate of alumina, in which form it is eaten with the bread made with the said baking powder.

The Court of quarter sessions found "that the appellant had unlawfully sold to the respondent a baking powder which is an article used for food within the meaning of the Sale of Food and Drugs Act, mixed with a certain ingredient, to wit, alum, which is injurious to health," and accordingly dismissed the appeal, subject to a case for the opinion of the Court upon the following points:—

(1.) Whether, on the facts stated, they were right in holding that the baking powder was an article of food, or an article used for food within the meaning of the Sale of Food and Drugs Act, 1875.

(2.) Whether there was evidence that the appellant sold the same mixed with an ingredient, to wit, alum, so as to render the article injurious to health.

Sir Richard Webster, Q.C. (*Brynmor Jones, Q.C.*, and *Macmorran*, with him), for the appellant. The baking powder is not an article of food. No one would think of eating baking powder by itself. But even assuming that it is an article of food, the baking powder cannot be said to be mixed with alum, for it does not come into existence as baking powder until the alum is already there. A substance which is an essential ingredient in the making of a compound cannot be treated as an adulteration of the compound itself.

(1) There was no finding in the case as to whether hydrate of alumina is injurious to health; but it seemed to be assumed that the effect on the human system of alum (potassio-aluminic-sulphate) and of hydrate of alumina would be practically the same.

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Finlay, Q.C. (*Rhys Williams*, with him), for the respondent. The fact that baking powder is never eaten by itself is no objection to its being regarded as an article of food. Neither flour, nor condiments such as pepper, are ever eaten by themselves, nor is vinegar ever drunk by itself; yet no one would venture to dispute that they are articles of food. Anything which is intended to be used in the preparation of food, and to form part of the food when eaten, must itself be an article of food within the meaning of this statute.

Sir R. Webster, Q.C., in reply.

1894. Jan. 20. The judgment of the Court (Hawkins and Lawrance, JJ.) was delivered by

HAWKINS, J. James James, the appellant, was on February 15, 1893, convicted by four justices for the county of Glamorgan for that he, on December 10, 1892, "unlawfully did sell to the respondent, Evan Jones, an inspector under the Food and Drugs Act, 1875, a certain article of food, to wit, baking powder, which was mixed with a certain ingredient, to wit, alum, injurious to health." Against this conviction James appealed to the general quarter sessions for the said county, when the conviction was affirmed and the appeal dismissed with costs, subject to the opinion of the Queen's Bench Division upon a special case, which was argued before us on December 18 last.

The Sale of Food and Drugs Act, 1875, in its preamble recites that it is desirable that the law regarding the sale of food and drugs in a pure and genuine condition should be amended. The interpretation clause, s. 2, enacts that "the term 'food' shall include every article used for food or drink by man other than drugs or water." Sect. 3 enacts that "no person shall mix, or order, or permit any other person to mix any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed under a penalty not exceeding 50*l.* for the first offence."

We are asked by the case to say: (1.) Whether the baking powder is an article of food within the meaning of the statute. (2.) Whether, assuming it be so, there is evidence to support the

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finding that the appellant sold the same to the respondent mixed with an ingredient, to wit, alum, injurious to health.

It will be observed that s. 3 creates two distinct and separate offences: one, the mixing or causing to be mixed any article of food with any ingredient rendering such article injurious to health, with intent that so mixed the same may be sold; the other, the actual selling of an article of food so injuriously mixed. These two are the only offences pointed at in s. 3. The mere sale of an article not itself an article of food, even though it be sold with the knowledge of the vendor that it is the buyer's intention to mix it with the ingredients of which an article of food—e.g., bread—is to be composed, is no offence under s. 3, and it makes no difference in a legal point of view that when sold it is mixed with other ingredients, not in themselves hurtful, some or one of which might in an unmixed state be used as articles or an article of food, if the injurious and the harmless ingredients are so inseparably mixed and in such quantities as that the mixture as a whole forms an injurious compound which nobody would dream of using as food. For instance, take the Excelsior Baking Powder: of course it could be truly said that pure ground rice is an article of food for man; but it would cease to be so if it were mixed with an equal quantity of alum and 20 per cent. of bicarbonate of soda, and sold in little penny packets of an ounce each. Who would venture to describe such a mixture as food for man? With equal truth, might not powder composed of poison, mixed with flour, be called food for man because pure flour is used? Possibly it may be said that the injurious ingredient when mixed with the other materials of which an article of food is composed become a part and parcel of such article; but that is no argument against the vendor of such injurious ingredient unless such ingredient can be treated as an article of food at the time of the sale. That is the moment when the test of its character is to be applied, and if it is not then an article of food no offence is committed by the vendor of it, though the purchaser or any other person who afterwards mixes it with an article of food intended for sale would be guilty of an offence. We are clearly of opinion that the baking powder in question is not an article of food, and that neither the sale of it, nor the admixture

of it with an article of food, unless such article is intended for sale, is prohibited by the statute. For his own use anybody may use it if he thinks fit, and it would certainly seem strange if for selling such a mixture, to a person who had a right to mix it with the ingredients forming his own bread or pastry, the vendor could be convicted of a criminal offence. We do not, however, in anything we have said intend to convey it as our opinion that nothing can be deemed to be an article of food unless it be made up into an eatable or drinkable form and fit for immediate use, for we have no doubt that the substantial and requisite materials for making, and which are to form part of the unadulterated article when made—e.g., flour, butter, salt, mustard, pepper, &c.—are articles of food; for though nobody would ordinarily dream of eating them alone, yet they are articles intended to form substantial components of articles of food, or to be eaten as adjuncts thereto. Such, however, is not the character of baking powder. We think the Court of quarter sessions were wrong in treating the baking powder in question as an article of food, or an article used for food.

It is unnecessary to answer the second question. The order of quarter sessions and the original conviction must be quashed.

Conviction quashed.

Solicitors for appellant: *Flux, Leadbitter, & Paterson, for Tillett & Co., Norwich.*

Solicitors for respondent: *Iliffe, Henley, & Sweet, for W. E. R. Allen, Cardiff.*

J. F. C.

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Dec. 16.

[CROWN CASE RESERVED.]

THE QUEEN *v.* STUART.

Criminal Law—Embezzlement—"Clerk or Servant"—Director of Company—24 & 25 Vict. c. 96, s. 68.

A director of a limited company, who is also employed as a servant to collect moneys for them, is liable to be convicted of embezzlement as a "clerk or servant" of the company under 24 & 25 Vict. c. 96, s. 68.

CASE reserved by the deputy chairman of the North London Court of Quarter Sessions.

The prisoner was tried at the North London Quarter Sessions, holden at Clerkenwell on June 23, 1893, on an indictment, drawn under 24 & 25 Vict. c. 96, s. 68, charging him with having, whilst he was servant to Scott & Co., Limited, embezzled certain moneys received by him as such servant for and on behalf of his employers. It was proved at the trial that the prisoner was employed by Scott & Co., Limited, under an agreement made with them, and that his duties were to canvass for orders for advertising, superintend the bill-posting, collect moneys due to the company, and to pay such moneys over to the cashier of the company as and when he collected them, the prisoner being paid one guinea per week for his expenses. It was also proved that the prisoner received, and failed to account for, certain of the moneys mentioned in the indictment; that he was a director and shareholder of the company, and as such had power to vote upon the question of his own salary and duties; that he took part as a director in the management of the company's business, and that at an extraordinary general meeting of the company he attended and took part in a discussion as to his own dismissal. The deputy chairman left the case to the jury, directing them that, if they were of opinion that the prisoner was in fact employed in the capacity of clerk or servant by Scott & Co., Limited, the fact that he was a director of that company did not in law prevent his being amenable to the

indictment, because his appointment as servant was a distinct and separate office, apart from his duties as director, as evidenced by the agreement.

The prisoner was found guilty.

The question for the opinion of the Court was whether, on the facts stated in the case, the prisoner was rightly convicted.

H. Warburton, for the prisoner. The prisoner cannot be convicted of embezzlement as a "clerk or servant." He was not indicted under 31 & 32 Vict. c. 116, s. 1, as being one of two or more "beneficial owners" of the money embezzled, nor for fraud as a director under s. 81 of 24 & 25 Vict. c. 96. The money partly belonged to him; he exercised control and management over the affairs of the company, and was entitled to take part in the decision of the question whether he should be dismissed or not. A "clerk or servant" must be a person wholly subject to the orders of his superiors, which the prisoner was not. [He referred to *Reg.* v. *Waite* (1), *Reg.* v. *Taffs* (2), and *Reg.* v. *Woolley*. (3)]

R. D. Muir, for the Crown, was not heard.

LORD COLERIDGE, C.J. In this case I think that the proper direction was given to the jury, and that they came to a proper conclusion. The prisoner here filled two capacities. He was a director and also a servant of the company, of which he was a member. He was a servant, not to himself, but to the company; and why the two distinct capacities of director and servant should not be filled by one person I do not understand. If the argument of the prisoner's counsel were good, it would apply to every shareholder of the company, and no person who held a share in the company could be convicted of embezzlement where he was employed as a clerk or servant to collect money for the company. It does not follow that because a person is a director he cannot be employed in the capacity of a servant. Here the

(1) 2 Cox, C. C. 245. (2) 4 Cox, C. C. 169.
(3) 4 Cox, C. C. 255.

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prisoner was so employed; he misappropriated money received by him, and he was rightly convicted.

MATHEW, GRANTHAM, LAWRANCE, and COLLINS, JJ., concurred.

Conviction affirmed.

Solicitor for prisoner: *W. H. Armstrong.*
Solicitors for Crown: *Wilson & Wallis.*

W. A.

1893
Dec. 18.
1894
Jan. 20.

WALLEN *v.* LISTER.

Metropolis—Building Acts—Builder engaged in erecting Building—Notice to conform to Provisions of Act—Order of Magistrate to enforce Compliance with Notice—Completion of Building between dates of Notice and Order—Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *ss.* 45, 46.

By s. 45 of the Metropolitan Building Act, 1855, if in erecting any building anything is done contrary to any of the rules of the Act, the district surveyor shall give to the "builder engaged in erecting such building" notice requiring him to remedy the breach. By s. 46: "If the builder to whom such notice is given makes default in complying with the requisition thereof," a justice of the peace may make an order directing him to comply with such requisition:—

Held, that a justice has no jurisdiction to make an order under s. 46 upon a builder who at the date of the order has completed the building and given up possession of it, even though he was engaged in erecting it at the time of the service upon him of the notice under s. 45.

CASE stated by a metropolitan police magistrate.

The respondent, a builder, was prior to and on September 15, 1892, the builder engaged in erecting two buildings in Ferdinand Street, in the district of West St. Pancras. The respondent did not, in respect of either of such buildings, give to the appellant, the district surveyor for the said district of West St. Pancras, the notice prescribed by s. 38 of the Metropolitan Building Act, 1855, viz., that he was about to build. Shortly before September 15, 1892, the appellant discovered that the said buildings were in course of erection, and on September 15 gave to the respondent two several notices, under s. 45 of the said Act, requiring him in each notice within forty-eight hours to enclose

the building therein specified with walls constructed with brick or stone or other hard and incombustible substances, and otherwise in accordance with the Act and by-laws in such notices referred to.

The respondent made default in complying with the requisitions of the said notices; and upon October 18, 1892, the appellant made two several complaints of such non-compliance before a police magistrate, who accordingly issued two summonses requiring the respondent to appear to answer such complaints on November 9. The respondent appeared in due course, but made no statement that he had completed and left the building; and on November 29, 1892, the magistrate, pursuant to s. 46 of the said Act, made two orders upon the respondent, requiring him to comply with the said notices respectively within six weeks. The respondent did not appeal against either of the said orders, nor did he comply with them. Accordingly the appellant, on April 5, 1893, took out two summonses against the respondent, under s. 47, for penalties for non-compliance with the said orders. On the hearing of the said summonses it was admitted that on November 29, 1892, the respondent was not engaged in erecting the buildings, but had some time previously completed and left them. Had such admission been made when the orders of November 29, 1892, were applied for, the magistrate would have declined to make them; and accordingly, on the authority of *Smith* v. *Legg* (1), he declined to enforce them, and dismissed the summonses for penalties for not complying with them, subject to a case for the opinion of the Court.

Avory, (*Daldy*, with him), for the appellant. It is enough that the respondent was engaged on the buildings at the time when the notices were served, and it is immaterial that he had ceased to be so engaged at the time when the orders for non-compliance with them were made. The magistrate was consequently right in making the orders of November 29. The case of *Smith* v. *Legg* (1) is distinguishable, the builder there having completed the building before the notice was served on him, and no longer answering the description of a "builder engaged in erecting a

(1) [1893] 1 Q. B. 398.

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building" at the time of the service of such notice. Sect. 46, under which the orders to comply with the notice are made, does not require that the builder should still be engaged on the building, but only that he should be a "builder to whom such notice" (i.e., a valid notice under s. 45) "is given," which was the case here. Further, the magistrate having made the orders was functus officio, and had no power to review his own decision.

Marshall Hall, for the respondent. The magistrate had no jurisdiction to make the orders, and was right in refusing to enforce them. The Act can never have intended that the magistrate should make an order which, in the absence of the owner's consent, the builder could not possibly comply with without committing a trespass. The reasoning of *Smith* v. *Legg* (1) supports the respondent's contention.

Avory, in reply.

1894. Jan. 20. The judgment of the Court (Hawkins and Lawrance, JJ.) was delivered by

HAWKINS, J. This appeal was argued before my brother Lawrance and myself on December 18 last. The questions involved are, whether a magistrate has jurisdiction, under s. 46 of the Metropolitan Building Act, 1855, to make an order upon a builder who has been, but who before the making of such order has ceased to be, engaged in erecting a building, to comply with a requisition duly made by a district surveyor under s. 45, and whether if such order be inadvertently made the magistrate may in the exercise of his discretion refuse to impose the penalties mentioned in s. 47 for non-compliance with it. In September, 1892, the respondent, a builder, was engaged in erecting a building in the parish of St. Pancras within the district for which the appellant was and is the district surveyor. On September 15, whilst the respondent was so engaged, the appellant duly gave him a notice in writing under s. 45 requiring him within forty-eight hours to do certain work therein specified. The respondent made default in complying with that requisition; whereupon the appellant on October 18, and whilst the respondent was still so engaged, made complaint

(1) [1893] 1 Q. B. 398.

to a magistrate of such non-compliance, and procured a summons to be issued requiring the respondent to appear before such magistrate on November 9; the hearing thereof was, however, adjourned until the 29th of that month, and on the last-mentioned day the magistrate made the order in question, directing the respondent within six weeks to comply with the requisition of the appellant.

When this order was made the respondent had for some time ceased to be engaged in erecting the building, having completed and left it. This fact was not brought to the attention of the magistrate. Had it been so, he would have declined to make the order. The order was not complied with; and thereupon, on April 5 last, the appellant caused the respondent to be summoned under s. 47 for the recovery of eighty-six penalties in respect of eighty-six days of the continuance of such non-compliance. This summons came on for hearing, on April 19, before the same magistrate who made the order. He refused to make the order asked for, and dismissed the summons, relying upon the authority of *Smith* v. *Legg*. (1) We think the magistrate was right in refusing to impose and enforce the penalties.

Having carefully considered the object of the legislature in giving a magistrate jurisdiction to make the order authorized by s. 46, and the language of that and the preceding section, we are of opinion that in fact the order was made without jurisdiction. It is very certain that the district surveyor has no power to make any such requisition as is mentioned in s. 45, unless it be made whilst the builder is actually engaged in erecting the building. It stands to reason that such limitation of time should be imposed, for it is only during such time that the builder can legally comply with the requirements of the district surveyor, unless by the assent of the owner who employs him. After his employment as builder has ceased and he has left the premises he could only re-enter by the permission of the owner. To re-enter without such permission would be a trespass which could not be justified by a plea that such re-entry was made in order to fulfil the requirements of the district surveyor's

(1) [1893] 1 Q. B. 398.

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notice. If the legislature had intended to give power to the builder to enter against the will of the owner, surely it would have conferred such a power in express language. But we need not labour this point, for it has been determined by express authority in *Smith* v. *Legg*. (1)

Before proceeding to discuss the provisions of s. 46, we desire to point attention to the fact that, although no doubt the requisition mentioned in s. 45 and non-compliance with it are essential to form the basis of an application to the magistrate under s. 46, there is no binding obligation in the requisition itself; it cannot be enforced by any process, and no penalty is incurred by disobedience to it. The order of a magistrate under s. 46 is the first and only order which is imperative upon the builder, and such order is not a mandate to obey the district surveyor's requisition, but is an independent order by itself, requiring judicial consideration before it is made, first as to the legality of the district surveyor's requisition, and next as to the time within which the things ordered to be done by him shall be done. In fixing that time of course he must have regard to that which is reasonable under the circumstances of the case as they exist when his order is made. No limit of time would be reasonable if during all that time compliance with his order would be practically impossible. It is difficult to imagine that the legislature intended to confer jurisdiction upon a magistrate to make an order which it was impossible for the builder to comply with. The object of the legislature was to enable the magistrate to enforce the rectification of that which he had adjudged to have been done or omitted contrary to the provisions of the Building Act; but this object could not be attained by making an order upon a builder whose power to obey it had ceased before it was made. The 47th section authorizing the infliction of a penalty of 20*l*. during every day of the continuance of non-compliance could only have been intended to apply to non-compliance by a person who had the power to obey, but had intentionally ignored, the order. To punish a man for not obeying an order, to which he had never the power to yield obedience, would be a harsh, unjust, and

(1) [1893] 1 Q. B. 398.

tyrannical piece of legislation, revolting to reason and good sense, which is inconceivable. It would amount to this: if the full penalties of 20*l.* per day were inflicted, the unhappy builder would be mulcted in penalties amounting to no less than 7300*l.* a year so long as the non-compliance continued.

The case of *Smith* v. *Legg* (1) was relied on by the learned counsel for the respondent as an authority in point in his favour. For the appellant it was said, and truly said, that there was this difference between that case and the present, viz., that in *Smith* v. *Legg* (1) the builder had completed his building before the district surveyor served his forty-eight hours' requisition under s. 45; whereas in this case both the forty-eight hours' requisition and the summons to appear before the magistrate with a view to obtaining his order were served whilst the builder was actually engaged.

Although this distinction between the facts of the two cases undoubtedly exists, we are nevertheless of opinion that the considerations upon which *Smith* v. *Legg* (1) was determined apply equally to the case before us. It is true that the 46th section in words refers to "the *builder to whom such notice is given*" as the person who may be summoned; but we think the words "engaged in erecting such building" in the 45th section govern and must be read after the word "builder" whenever that word is used in the 46th section: see the interpretation clause, s. 3, of the Building Act; *Parsons* v. *Timewell* (2) by Lush, J.; *Smith* v. *Legg* (1), by Lord Coleridge and Cave, J.; and see also *Attorney-General* v. *Smith* (3), where it was held that executors, having completed the duties of administration, were not persons acting in the administration of the estate.

We think, for the reasons we have given, that the order of November 29 was in fact made without jurisdiction, and the magistrate was right in refusing to enforce it. Assuming, however, for the sake of argument, that there was jurisdiction to make the order, we think the magistrate, when he had it brought to his attention that it was made at the time when the builder had ceased to have power to obey it, acted within his

(1) [1893] 1 Q. B. 398. (2) 44 J. P. 296.
(3) [1892] 2 Q. B. 289.

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jurisdiction and exercised a sound discretion in refusing to inflict penalties upon the builder, who neither wilfully nor negligently omitted to do that which he was commanded to do by such order. It may be said, and truly, that he might have inflicted a mere nominal fine for each day's non-compliance. It would have been a farce to inflict a fine of a farthing a day for an indefinite time, with a knowledge that no fine could give the builder power to obey the order. We cannot come to the conclusion that the magistrate had no discretion to refuse to go through so useless and oppressive a proceeding of inflicting nominal penalties for disobedience to an order inadvertently made under a wrong impression of the facts, and which, knowing the facts, he believed he had no jurisdiction to make. We cannot help feeling that if, by what has occurred, the district surveyor feels in a position of embarrassment, this is a great deal due to his own laches; for if, instead of delaying the issue of his summons till October 18, he had issued and served it immediately after the expiration of his forty-eight hours' notice under s. 45, he would in all probability have obtained a magistrate's order, and the time allowed for compliance would have expired before the respondent ceased to be engaged in his building operations. This, however, has not influenced us in forming the opinion we have expressed. The point that the order was not appealed against was not made the subject of discussion before us: we have not, therefore, dealt with it. Nor do we think it would have made any difference in the result we have now arrived at, assuming the order to have been in fact made without jurisdiction. We dismiss this appeal with costs.

Appeal dismissed.

Solicitor for appellant: *Blaxland.*

Solicitors for respondent: *Baker, Folder, & Upperton.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1893
Dec. 19.
1894
Jan. 17.

SEED *v.* BRADLEY.

Bill of Sale—Term for Maintenance of Security—Covenant to replace Chattels damaged or worn out—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 6, 9 —*Form in Schedule.*

A bill of sale, by which furniture in a dwelling-house specifically described in the schedule to the bill of sale was assigned as security for a debt, contained a covenant by the grantor that, so long as any money should remain owing on the security of the bill of sale, he would not remove any of the said chattels from the said dwelling-house without the previous consent of the grantee, except for necessary repairs, and would replace any articles damaged or worn out with any others of equal value to be included in the security:—

Held, that such a covenant might be inserted in the bill of sale as being "for the maintenance of the security," and therefore did not constitute a deviation from the form in the schedule to the Bills of Sale Act, 1882.

Thomas v. *Kelly* (13 App. Cas. 506) distinguished.

APPEAL from judgment of Day, J., at the trial of an interpleader issue without a jury.

The facts were as follows:—

Goods having been taken in execution upon a judgment obtained by the defendant in the issue were claimed by the plaintiff under a bill of sale given by the judgment debtor. By the bill of sale the judgment debtor, in consideration of 200*l.* owing from him to the plaintiff, assigned to the plaintiff, by way of security for the payment of the debt and interest thereon at 5 per cent. per annum, all and singular the chattels and things specifically described in the schedule to the bill of sale, which consisted of household furniture in a certain dwelling-house. The bill of sale contained a covenant by the grantor that, so long as any money should remain owing on the security of the bill of sale, he would not remove any of the said chattels and things from the said dwelling-house in the schedule mentioned without the previous consent of the grantee, except for necessary repairs, and would "replace any articles damaged or worn out with any others of equal value to be included in this security." The defendant contended that this covenant rendered the bill of sale void as not being in conformity with the

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form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882. The learned judge held the bill of sale good, and gave judgment in favour of the plaintiff.

C. C. Scott, (*Gully, Q.C.*, with him), for the defendant. The covenant to replace articles damaged or worn out vitiates the bill of sale. It was held in *Kelly* v. *Kellond* (1) and *Thomas* v. *Kelly* (2) that, if a bill of sale purports to assign after-acquired property, which is not and is incapable of being specifically described in the schedule to the bill of sale, it is altogether void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882. The terms of this bill of sale amount to such an assignment of after-acquired property; because goods which are to be acquired to replace such of the articles described in the schedule as become damaged or worn out, and which are not described in the schedule, are to be included in the security. In *Consolidated Credit Corporation* v. *Gosney* (3) and *Furber* v. *Cobb* (4) bills of sale containing such a covenant as that in question were no doubt held good on the ground that such a covenant was for the maintenance of the security, and therefore could be inserted in accordance with the direction in the form; but those cases are inconsistent with and must be taken to have been overruled by the decision of the House of Lords in *Thomas* v. *Kelly*. (2) By s. 6, sub-s. 2, of the Act of 1882, certain things are expressly excepted from the provision of s. 4 that renders the bill of sale void, except as against the grantor, in respect of personal chattels not specifically described in a schedule to the bill of sale; and on the general principles of construction the exceptions must be confined to the things so expressly mentioned. The effect of the decision of the learned judge in the Court below is to extend the exceptions to matters not mentioned in that section. If the plaintiff's contention is correct, the latter part of s. 6, sub-s. 2, was not wanted. [He also cited *Brantom* v. *Griffits* (5); *Davis* v. *Burton* (6); *Roberts* v. *Roberts*. (7)]

(1) 20 Q. B. D. 569.
(2) 13 App. Cas. 506.
(3) 16 Q. B. D. 24.
(4) 18 Q. B. D. 494.
(5) 1 C. P. D. 349.
(6) 10 Q. B. D. 414; 11 Q. B. D. 537.
(7) 13 Q. B. D. 794.

Smyly, Q.C., and *A. M. L. Langdon*, for the plaintiff. Sect. 9 of the Act of 1882 makes a bill of sale void as against everybody if not in accordance with the form. Sect. 4 avoids the bill of sale except as against the grantor in respect of chattels not specifically described in the schedule. There is no suggestion in this case that the goods in question included any not specifically described in the schedule. Therefore no question arises under s. 4, and the only question that can arise is whether the bill of sale is void under s. 9 as not being in accordance with the form in the schedule. Such a covenant as that contained in this bill of sale is necessary for maintenance of the security, and therefore may be inserted under the direction in the form to insert "terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security." A covenant for the insurance of the goods in order to maintain the security necessarily involves that after-acquired property will be included in the security. It must be intended that the insurance money or goods to be purchased therewith shall be subject to the security. The plaintiff's contention does not deprive the latter part of s. 6, sub-s. 2, of meaning. That provision goes beyond mere maintenance of the security, and allows the substitution of other fixtures, plant, or trade machinery for the fixtures, plant, or trade machinery specifically described in the schedule to the bill of sale, although the latter may not be damaged or worn out. In *Thomas* v. *Kelly* (1) the House of Lords were not dealing with a covenant for the maintenance of the security. The provisions of the bill of sale in that case went far beyond anything that could be called maintenance of the security. It purported to assign all chattels and things which might at any time during the continuance of the security be on the same or other premises, whether brought there in substitution for, or renewal of, or in addition to the chattels and things assigned by way of security for the payment of the money. It is obvious that that case was not analogous to the present. There is nothing in the judgment in the House of Lords indicating any intention to overrule *Furber* v. *Cobb* (2), which was cited.

(1) 13 App. Cas. 506. (2) 18 Q. B. D. 494.

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C. C. Scott, in reply. A covenant to repair the chattels assigned would be a covenant for the maintenance of the security, but a covenant to replace them by others is a covenant to substitute another security.

Cur. adv. vult.

Jan. 17. LOPES, L.J. I agree with Day, J., and think the bill of sale good.

Several objections were taken to its validity. One only was relied upon, which was, that the bill of sale assigns certain articles specifically set out in the schedule, and then contains a covenant that, as long as any money shall remain owing on the security of these presents, the mortgagor shall not remove any of the said chattels in the dwelling-house without the previous consent of the said mortgagee, except for necessary repairs, and will replace any articles damaged or worn out with others of equal value to be included in the security.

It was candidly admitted by Mr. Scott, who most ably argued the case for the appellant, that, but for the case of *Thomas* v. *Kelly* (1) in the House of Lords, the present case would fall within the authority of the *Consolidated Credit Corporation* v. *Gosney* (2), and *Furber* v. *Cobb*. (3)

I am clearly of opinion that this case is within the authority of those cases, and is outside and easily distinguishable from *Thomas* v. *Kelly*. (1)

The law as it stood before that case may be thus stated. The scheduled form of a bill of sale annexed to the Act of 1882 permits the introduction into the body of the bill of sale of "terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security." Clauses, therefore, for the maintenance or defeasance of the security are unobjectionable and do not vitiate the bill of sale.

In *Consolidated Credit Corporation* v. *Gosney* (2), a bill of sale was supported containing an agreement that the grantor should replace any chattels or things which should be worn out with others of equal value; and in *Furber* v. *Cobb* (3), an agreement

(1) 13 App. Cas. 506. (2) 16 Q. B. D. 24.
(3) 18 Q. B. D. 494.

by the grantor not to permit or suffer the chattels to be destroyed or injured or to deteriorate in a greater degree than by reasonable wear and tear, and forthwith to replace, repair, and make good the same, was said to be in accordance with the form, Sir James Hannen saying at the end of his judgment, when speaking of the covenant which he thought (contrary to the opinion of Bowen, L.J. in the Court below) was good, that he thought the question "of great practical importance, for such a covenant is very likely to be introduced into bills of sale."

This bill of sale, therefore, does not sin against the statutory form, unless the cases to which I have referred are altered or qualified by *Thomas* v. *Kelly* (1) in the House of Lords.

The *Consolidated Credit Corporation* v. *Gosney* (2) is not cited in *Thomas* v. *Kelly*. (1)

If the bill of sale in *Thomas* v. *Kelly* (1) is looked at, it will be found to be altogether different from the bill of sale in *Consolidated Credit Corporation* v. *Gosney*. (2) It grants to the holder of the bill of sale the chattels specifically described in the schedule, together with the other chattels and things, the property of the mortgagor, now in or about the premises, and also the chattels and things which may at any time during the continuance of this security be in or about the same or *any other premises* of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or *addition to* the chattels and things hereby assigned. Such terms go far beyond any terms necessary for the maintenance or defeasance of the security. The words are so wide and so comprehensive that they would enable the lender to sweep up all future property of the borrower, and would defeat the chief object the legislature had in view when the Act of 1882 was passed.

We were in argument much pressed with sub-s. 2 of s. 6 of the Act of 1882, and it was said that the only things which need not be specifically described were those mentioned in s. 6.

Sects. 4, 5, and 6 relate only to the schedule containing an inventory of personal chattels to be annexed to the bill of sale, and, in my judgment, in no way control the terms that may be

(1) 13 App. Cas. 506. (2) 16 Q. B. D. 24.

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Lopes, L.J.

inserted in favour of the maintenance or defeasance of the security as provided in the scheduled form. I believe the legislature intended by sub-s. 2 of s. 6 to relax the stringency of the previous rules in favour of business and trade by permitting a substitution of one thing for another in the cases named, although the object was not to maintain or defeat the security. I will give as illustration a substitution of steam-power for horse-power, or of electricity for gas, although the security was in no way affected thereby, and the substitution was in no way necessary for its maintenance.

The bill of sale in *Thomas* v. *Kelly* (1) dealt with chattels which could not be said to be within the exception contained in sub-s. 2 of s. 6, nor could be brought within any term for the maintenance of the security.

Thomas v. *Kelly* (1) is clearly distinguishable from the present case, and I find nothing inconsistent in saying that the bill of sale in that case was bad and in this good.

I cannot think that the House of Lords in *Thomas* v. *Kelly* (1) intended to ignore that portion of the scheduled bill of sale which permits terms for the maintenance of the security (such as exist in this bill of sale) to be introduced.

The appeal must be dismissed with costs.

KAY, L.J. The execution creditor claims on the ground that the bill of sale is void under s. 9 of the Bills of Sale Act, 1882, as not in accordance with the scheduled form. It contains a covenant by the grantor that "so long as any money shall remain owing on the security of these presents" the grantor "will replace any articles damaged or worn out with any others of equal value to be included in this security." The scheduled form contemplates a covenant by the grantor for insurance and also for maintenance or defeasance of the security. Insurance is commonly against fire. A covenant to insure and in case of fire to expend the money received in replacing the chattels destroyed or injured by others which shall be included in the security seems to be the very thing intended. Then, when in addition the form contemplates a covenant for maintenance, it seems clear

(1) 13 App. Cas. 506.

that means to repair chattels damaged and to replace those worn out or destroyed by accident other than fire. It is argued that repair of the actual chattels assigned was alone intended. But this would not satisfy the words. They are to maintain, not the chattels, but the "security," and that the meaning of "security" is larger than the subject of the security is shewn by the collocation of the word "defeasance." "Defeasance of the chattels" would be nonsense. "Defeasance of the security" means of the "mortgage security." So "maintenance" must mean "maintenance of the mortgage security"; and this is literally and strictly carried out by such a covenant as we have now to consider.

Then it is argued that this conclusion is inconsistent with *Thomas* v. *Kelly*. (1) But that was not a decision upon a covenant for maintenance of the security. The bill of sale in that case contained an assignment of chattels specifically described in the schedule in or about certain premises there mentioned, and also of "all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed) whether brought there in substitution for or renewal of or in addition to" the scheduled chattels. Those words "in addition to" made it impossible to treat the assignment as though it were a covenant to maintain the security. No such suggestion appears in the argument as reported. But in the speech of Lord Halsbury he says that the 2nd sub-section of s. 6 of the Act of 1882 "undoubtedly seems to indicate that goods not capable of specific description and to be afterwards supplied may, nevertheless, be so included in the security as yet not to make the bill of sale void. But, if one supposes the assignment to be of all such goods as are the subject of the proviso in question, and that in the schedule they were properly described, but added thereto were the words which give rise to the argument, namely, such goods as should be in substitution thereof, the form of the deed would be in accordance with the statute, though the schedule should contemplate substituted articles."

Sect. 4 avoids a bill of sale, except as against the grantor, in

(1) 13 App. Cas. 506.

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respect of any personal chattels not specifically described in the schedule. Sect. 6, sub-s. 2, provides that nothing contained in the previous sections shall avoid a bill of sale in respect of, inter alia, any fixtures, plant, or trade machinery brought upon the premises "in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule."

Therefore an assignment of such substituted articles—which would only have the effect of a covenant to assign—is permitted by sub-s. 2 of s. 6. But then this substitution is confined to "fixtures, plant, or trade machinery," and does not include other chattels such as furniture in a dwelling-house; and it may be argued that a covenant to assign any substituted chattels which were not "fixtures, plant, or trade machinery," would not be sanctioned by s. 6, sub-s. 2. That is so. But the form in the schedule contemplates a covenant for maintenance of the security, whatever may be the nature of the chattels mortgaged. This is not inconsistent with s. 6, sub-s. 2. That section allows certain trade chattels which may be afterwards acquired to be included, not merely for the purpose of maintaining the security, but for the obvious reason that, unless this could be done, a manufacturer who had given a bill of sale could not make any alteration or improvement in his plant, fixtures, or machinery without lessening the security—that is, practically, without the consent of the mortgagee. In the interest of trade he is to be allowed to do this on the terms that the security is to cover the substituted articles. But in addition to this, the scheduled form shews that a covenant for maintenance of the security is to be allowed in every case, whether the mortgaged chattels are plant, fixtures, or trade machinery, or mere furniture of a dwelling-house, or other chattels not coming within the description in s. 6, sub-s. 2.

I have only to add that this construction of the Act has already been adopted by the Court of Appeal in the case of *Furber* v. *Cobb* (1), where Sir James Hannen says of a similar covenant that it was "essentially necessary for maintaining the security agreed on; and, if I had been required to give an example of the words under consideration, I should have selected this as the most obvious." *Furber* v. *Cobb* (1) was cited in the argument in

(1) 18 Q. B. D. 494.

Thomas v. *Kelly* (1) in the House of Lords; and I do not find any intimation of dissent from it by any member of that tribunal.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the plaintiff: *Pritchard, Englefield & Co., for Butcher & Barlow, Bury.*

Solicitors for the defendant: *Norris, Allens, & Chapman, for Diggles & Ogden.*

E. L.

GOZZETT, APPELLANT *v.* THE MALDON URBAN SANITARY AUTHORITY, RESPONDENTS.

1894 *Jan.* 15.

Local Government—Streets—New Street—Width—Construction—Bye-laws—Laying out New Street—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 157.

By the Public Health Act, 1875, s. 157, every urban sanitary authority may make bye-laws with respect to the width and construction of new streets.

The respondents, an urban sanitary authority, made bye-laws providing that every person who should lay out a new street exceeding 100 feet in length should lay out such street as a carriage road, with footways, and of a width of not less than thirty-six feet.

The appellant was lessee of a piece of ground, together with a right of way over the adjoining road, which was fifteen feet wide, for a distance of more than 100 feet.

The appellant commenced to build two houses on the ground of which he was lessee, but did not widen the road over which he had a right of way to thirty-six feet. He was summoned by the respondents for laying out a new street of a width of less than thirty-six feet, contrary to the bye-laws:—

Held, that what the appellant had done, in commencing to erect the houses on the piece of ground adjoining the road, did not amount to laying out the road as a new street, and therefore he was not liable to be convicted.

CASE stated by justices.

The appellant was summoned on the information of the clerk to the respondents, for that he in the borough of Maldon did lay out a certain new street designated "Lodge Road" as a carriage road of a width of less than thirty-six feet, contrary to the bye-laws for the borough. (2)

(1) 13 App. Cas. 506.

(2) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157: "Every urban authority may make bye-laws

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Upon the hearing of the summons the following evidence was called on behalf of the respondents.

Mr. Beaumont, the surveyor to the respondents, produced and proved the bye-laws, and a plan of the Lodge estate.

He further said: "The estate is bounded on the south-west by the London Road, which is an old highway, and on the north-west by Dykes Chase, which is a public footway twelve feet wide. The Lodge Road extends from the Lodge gate to the London Road, and is 390 feet long and fifteen feet wide, and is used as a roadway to 'The Lodge.' I purchased the Lodge estate in July, 1892. In September, 1892, I leased the Lodge, with a portion of the garden, to Mr. Gosden for fourteen years, with a right of way for horses, carriages, and foot passengers from the London Road to the Lodge over the piece of ground fifteen feet wide called the Lodge Road, and in January, 1893, I leased to the appellant the piece of ground coloured pink on the plan for ninety-nine years at a ground-rent of 14*l.* per annum, together with a right of way over the Lodge Road from the London Road to the extremity of the ground so leased, being a distance of 170 feet. In June, 1893, I sold to Mr. James Gosden the part of the property marked 'The Lodge' (being the uncoloured portion on the plan), together with a right of way over the Lodge Road for himself and all others authorized by him. I prepared plans for the erection by the appellant of two houses on the piece of land I had leased to him, and I laid the plans before the respondents on June 15, 1893. The main walls of the houses were set back six feet from the Lodge Road, the bay

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with respect to the following matters: (that is to say), (1.) With respect to the level, width and construction of new streets, and the provisions for the sewerage thereof."

The following were the bye-laws material to the case:—

"3. Every person who shall lay out a new street as a carriage road, shall lay out such street of a width of not less than thirty-six feet, and he shall lay out on each side of such new street a footway of a width equal to one-sixth part of the entire width of such street, and he shall lay out the remaining two-thirds of such width as a carriage way."

"4. Every person who shall construct a new street which shall exceed 100 feet in length, shall construct such street for use as a carriage road, and shall, as regards such street comply with the requirements of every bye-law relating to a new street intended for use as a carriage road."

windows four feet. The appellant a few days before July 21, 1893, dug part of the foundation for the houses, and on July 21 the plans were again produced to the respondents, but they were not approved. On May 2, 1893, I offered the Lodge estate for sale in twelve lots, ten of which were building plots, but none of the lots were sold. A board is now up on the plot of ground facing the London Road, advertising the plots for sale as building plots. The board was placed there in October, 1892. Anyone passing must see the board. I may have seen the appellant there many times. He must have seen the board. I believe his men put the board up."

On cross-examination the witness said: "The land coloured yellow on the plan is still my own, and is used as a garden. The Lodge Road also belongs to me, subject to the rights of way granted over it. The brick wall between Lodge Road and Dykes Chase is also my property. There is no outlet on the north side. There is a gate at the London Road end of Lodge Road, and also at Mr. Gosden's end. The depth of my land is about one hundred feet. I have heard of no intention of building on the other side of Dykes Chase. I have not dedicated the Lodge Road to the public. I am unrestricted as to any use to which I may put the land coloured yellow. The board advertizes the land coloured yellow for sale, with application to be made to me."

On re-examination the witness said: "The wall is mine. There is nothing to prevent my opening on to Dykes Chase for foot-passengers."

No evidence was called for the appellant, and it was contended on his behalf:

That he had not laid out the Lodge Road as a new street within the meaning of the Public Health Act, 1875, or the bye-laws of the respondents, but that all he had done, or intended to do, was to build two houses on his piece of ground; and that he had no power or control over the land in front or on either side of his piece of ground, and that in building the houses he was simply making use of his own land, without any intention of converting the Lodge Road into a new street;

That the Lodge Road never could be made of the required

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width for a new street by the appellant without acquiring the land on the opposite side of Dykes Chase;

That the Lodge Road had not been dedicated to the public, but had gates at each end, and was used merely as a private carriage way to the Lodge residence, and therefore had not been converted into a new street;

That the Lodge estate as a whole (including the site of the Lodge Road) must, notwithstanding the intervening brick wall, be regarded as abutting on Dykes Chase, and that all the appellant had done was to commence erecting two houses facing Dykes Chase, with a private carriage drive from the London Road;

That if a new street had been laid out, it was done by the owner of the Lodge estate, Mr. Beaumont, and not by the appellant.

The justices found that the commencing to build the two houses, and the other facts proved, sufficiently constituted a laying out of a new street as a carriage road of a width less than thirty-six feet, and a consequent contravention of the bye-laws, and convicted the appellant.

The question for the opinion of the Court was: Whether the appellant, by commencing to erect the two houses on his piece of ground, and on the other facts proved, did lay out the Lodge Road as a new street, contrary to the bye-laws.

Channell, Q.C. (*W. Wightman Wood*, with him), for the appellant. The conviction is wrong, and the contention of the appellant before the magistrates was well-founded. The mere building of houses does not constitute laying out a new street. The authorities shew that it means doing something to the road. [He referred to *Williams* v. *Powning* (1); *Robinson* v. *Local Board of Barton Eccles.* (2)]

R. Cunningham Glen, for the respondents. The effect of the Public Health Act and the bye-laws is to impose certain restrictions on the right of dealing with private land, and in the present case the bye-laws prohibit laying out a new street of less than the

(1) 48 L. T. (N.S.) 672.

(2) 8 App. Cas. 798, reversing the judgment of the Court of Appeal, 21 Ch. D. 621.

prescribed width. It is a question of fact whether the appellant is or is not laying out a new street, and the justices have found against him.

[DAY, J. What evidence is there of any intention to lay out a new street?]

[*Taylor* v. *Corporation of Oldham* (1) and *Hendon Local Board* v. *Pounce* (2) were also referred to.]

Channell, Q.C., was not called upon in reply.

DAY, J. I am clearly of opinion that this conviction ought to be quashed. There is no evidence that the appellant was a person who was constructing a new street exceeding 100 feet in length, within the meaning of rule 4 of the respondents' bye-laws. He was not constructing or laying out a new street at all. There is a private way which he has a right to use; but he has done nothing to shew that he has any intention of laying out a new street. The sanitary authority cannot insist on the appellant making the road thirty-six feet wide. If there is any evidence of liability against any one it would be against Mr. Beaumont, the freeholder. If any one can be liable he would be the person. It seems to me that the sanitary authority are premature in their action. When this road is made into what I may describe as a two-sided street, it is possible that the sanitary authority may be entitled to interfere; but it is utterly unreasonable to require a person who only has a lease of one bit of the land to make the whole length of this imaginary new street thirty-six feet wide.

LAWRANCE, J. I am of the same opinion. The bye-law which has been relied upon has no reference to this case. The cases to which it applies are cases where a proposed new street is laid out on some person's property. There are also other cases where houses are built on lanes or narrow roads, and in such cases as those it has been held that the lanes or roads are new streets, for if it were otherwise the sanitary authority would not have any power to widen a narrow lane or road. In the present case the sanitary authority appear to think that at some distant day this

(1) 4 Ch. D. 395. (2) 42 Ch. D. 602.

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road will become a street; but if this is so, it cannot entitle them to call upon the appellant to widen the road.

Judgment for the appellant.

Solicitors for appellant: *Beaumont, Son, & Rigden, for Beaumont & Bright, Maldon.*

Solicitors for respondents: *Storey & Cowland, for J. Freeman, Town Clerk of Maldon.*

P. B. H.

C. A.

1893

Nov. 16, 17, 24.

[IN THE COURT OF APPEAL.]

THOMPSON *v.* MAYOR, &c., OF BRIGHTON.
OLIVER *v.* LOCAL BOARD OF HORSHAM.

Local Government — Highway — Nuisance — Cover of Man-hole in Sewer — Wearing away of Road — Sewers and Highway Authority, Liability of — 38 & 39 *Vict.* c. 55 (*Public Health Act*, 1875), *ss.* 13–20, 144, 149.

In an action to recover damages for injury caused by negligence, it appeared that the defendants were an urban authority under the Public Health Act, 1875, having as such the property in and the management of the sewers and the streets, and that they had inserted a man-hole in one of the sewers. The cover of this man-hole was in the highway, was properly made and in good repair, but the road had been allowed to wear away so that the cover projected above the surface of the road. The plaintiff's horse stumbled over this projection and was injured.

Held (reversing the decision of Day and Wright, JJ., who had followed *Kent* v. *Worthing Local Board* (10 Q. B. D. 118)), that the only breach of duty which could be imputed to the defendants was their omission to repair the highway, that for this no action would lie, and that the defendants were not liable.

Kent v. *Worthing Local Board* (10 Q. B. D. 118) overruled.

APPEALS from orders of Day and Wright, JJ., dismissing appeals from judgments of the county court giving damages against the defendants.

THOMPSON *v.* MAYOR OF BRIGHTON.

In this case the plaintiff was riding along a public road in Brighton. His horse's foot struck the cover of a man-hole in the middle of the road, which projected about one and a half inches above the surface of the road, and the horse was thrown down and seriously injured.

The man-hole had been inserted in the road by the corporation of Brighton as the sewer authority. It was a proper cover, and there was no fault in its construction, nor was it at all out of repair. The accident arose from the road not having been kept up to its level by the corporation, who were the road authority.

The plaintiff sued the corporation of Brighton in the county court for 50*l.* as damages occasioned by their negligence.

The county court judge, in opposition to his own opinion, gave judgment for the plaintiff for 50*l.*, considering himself bound by *Kent* v. *Worthing Local Board* (1), in which his own decision in that case had been reversed.

OLIVER *v.* LOCAL BOARD OF HORSHAM.

In this case a horse belonging to the plaintiff, while being ridden along a road which was under the control of the Horsham Local Board, was tripped up by striking his foot against a sewer grating which had been inserted in the road by the local board as the sewer authority. The damages were agreed at 40*l.* if it should be held that the board was liable. The grating was properly constructed and in good repair, and the accident was attributable solely to the neglect of the local board, who were also the road authority, to keep up the road to the level of the grating. The county court judge, on the same ground as in the other case, gave judgment for the plaintiff.

The defendants in each case appealed to a Divisional Court, and on June 26 Day and Wright, JJ., considering that *Kent* v. *Worthing Local Board* (1) had not been overruled, though it had been unfavourably observed upon, dismissed the appeals. The defendants in each case appealed.

Moulton, Q.C. (*Boxall*, with him), for the corporation of Brighton. The defendants are sued, not as the sewer authority, in which capacity they were guilty of no default, but as the road authority. If there has been any default in not repairing the road, the defendants are not liable in a civil action, but can only be proceeded against by indictment; for the repair of a road is a public, not a private, duty, and they have been guilty

(1) 10 Q. B. D. 118.

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of no misfeasance, but only of non-feasance. The county court judge and the Divisional Court decided the case on the authority of *Kent* v. *Worthing Local Board* (1); but that case was questioned in *Moore* v. *Lambeth Waterworks Company* (2), and has been practically overruled by *Cowley* v. *Newmarket Local Board* (3), in which the previous case of *Gibson* v. *Mayor of Preston* (4) was approved. It makes no difference that the duties of sewer authority and road authority are combined in the same body: *Graham* v. *Mayor of Newcastle-upon-Tyne.* (5)

R. Burleigh Muir, for the Horsham Local Board, followed the same line of argument. He also cited *Municipality of Pictou* v. *Geldert* (6), and *Sanitary Commissioners of Gibraltar* v. *Orfila.* (7)

W. Graham, for the plaintiff Oliver. The local board of Horsham is the local authority, and there is vested in them by statute the control of the sewers and the highways. This imposes on them the duty of keeping the sewers and highways in order. It was their duty to keep the man-hole in such a state as not to be a nuisance, and they were bound to avail themselves of all their statutory powers for the purpose of discharging this duty. This principle is laid down in *Geddis* v. *Proprietors of Bann Reservoir.* (8) The Bann Company were authorized by statute to make a reservoir for the purpose of equalizing the flow of water in the River Bann, and for this purpose to send down water into the Bann through the River Muddock; and they had powers which enabled them to widen, deepen, scour, and cleanse the channel of the Muddock. Owing to the channel of the Muddock not being scoured, the water sent down by the company flooded the plaintiff's land, and the company were held liable. Lord Blackburn says: "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a

(1) 10 Q. B. D. 118.
(2) 17 Q. B. D. 462.
(3) [1892] A. C. 345.
(4) Law Rep. 5 Q. B. 218.
(5) [1893] 1 Q. B. 643.
(6) [1893] A. C. 524.
(7) 15 App. Cas. 400, at p. 411.
(8) 3 App. Cas. 430, at p. 455.

reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is within this rule 'negligence' not to make such reasonable exercise of their powers. I do not think that any of the cases are in conflict with this view of the law." On that principle it was negligence in the Horsham Board not to exercise all the powers they had to prevent the grating from being a nuisance.

[A. L. SMITH, L.J. Is not that opposed to *Moore* v. *Lambeth Waterworks Co.* (1), for the company there could have prevented the nuisance by lowering their plug?]

In that case the urban authority was bound by the Public Health Act, 1875, s. 66, to have fire-plugs provided, and was empowered to enter into an agreement with a water company for that purpose. The company put the plug in, and their duty was completed—the plug was not put there for their purposes; they had constructed it properly, and the nuisance did not arise from any act or default on their own part. The case would be like the present if they had put the plug there for their own purposes, and had had power to repair the road. The judges who decided *Kent* v. *Worthing Local Board* (2) followed the principle laid down by Lord Blackburn, and their decision ought to be upheld.

R. M. Bray, for the plaintiff Thompson. The defendants in this case are merely an urban authority which has powers over sewers and roads, but it is not acting as a road authority or as a sewer authority. It acts only as an urban authority. Its powers depend on the Public Health Act, 1875 (38 & 39 Vict. c. 75). Sect. 6 constitutes urban authorities. Sects. 13–20 deal with sewers and drains, and authorize the local authority to make sewers, and order them to ventilate them. They are a body acting under statutory authority, and have imposed on them the obligation defined by Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (3) to use their powers so as to prevent what they put in the road from being a nuisance. If they had no power to interfere with the road, then the observations of Lord Esher in *Moore* v. *Lambeth Waterworks Co.* (1) would apply. But by s. 144,

(1) 17 Q. B. D. 462. (2) 10 Q. B. D. 118.
(3) 3 App. Cas. 430, 455.

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every urban authority is made surveyor of highways within its district, and by s. 149 all streets which are highways are vested in them. So the answer to the question put in the last-mentioned case, "Can they repair the road?" is, Yes. The ground on which a corporation is not liable for non-repair of a road is stated in *Cowley* v. *Newmarket Local Board.* (1)

[A. L. SMITH, L.J. How do you get over the decision in that case?]

The liability is imposed on the board by the sections relating to sewers, and is not taken away by their being also surveyors of highways. If the grating had been out of repair, the defendants would, as the sewer authority, have been liable: *Blackmore* v. *Vestry of Mile End Old Town* (2); and there is no rational distinction between allowing it to get out of repair and allowing it to project above the surface of the road. It was their duty to keep it so as not to be a nuisance: *Borough of Bathurst* v. *Macpherson.* (3)

Muir, in reply. The duties of urban boards are distinct from each other, so that they act under different statutes in respect of different matters: *Graham* v. *Mayor of Newcastle-upon-Tyne.* (4) They are merely appointed by the Public Health Act to fill offices which already existed.

Cur. adv. vult.

1893. Nov. 24. LINDLEY, L.J. I have had an opportunity of reading the judgment of A. L. Smith, L.J., in which I concur, and my judgment, which I will read, is to be taken as a rider to that judgment.

The House of Lords, in *Cowley* v. *Newmarket Local Board* (5), affirmed *Gibson* v. *Mayor of Preston* (6), and declined to apply the principles laid down in *Couch* v. *Steel* (7) and acted upon in *Hartnall* v. *Ryde Commissioners* (8) to local authorities governed by the Public Health Act, 1875. Having regard to this decision, it is, in my opinion, impossible to follow *Kent* v. *Worthing Local*

(1) [1892] A. C. 345, 350.
(2) 9 Q. B. D. 451.
(3) 4 App. Cas. 256, 265.
(4) [1893] 1 Q. B. 643, 646.
(5) [1892] A. C. 345.
(6) Law Rep. 5 Q. B. 218.
(7) 3 E. & B. 402.
(8) 4 B. & S. 361.

Board. (1) The injury to the plaintiff was caused by a breach of duty on the part of the defendants; but that breach of duty was omitting to keep the road in such a state as to be safe for traffic, having regard to the sewer grating which was lawfully in the road, and was not itself out of repair. Apart from the state of the road, no breach of duty can be imputed to the defendants, and consequently no cause of action has accrued to the plaintiff. But for the only breach of duty which can be imputed to the defendants I am now compelled to say that no action lies. The law on this subject is, in my opinion, very unsatisfactory; but I cannot on that account declare it to be different from what it is. The appeal must be allowed and judgment given for the defendants, but without costs, either here or below, for, although the plaintiff fails, the defendants' breach of duty is clear, and, so long as *Kent* v. *Worthing Local Board* (1) stood unreversed, the plaintiff was reasonably guided by it. The same judgment must be given in the Brighton case.

A. L. SMITH, L.J. The questions in these appeals are whether a local authority who by statute have vested in them the highways in their district, together with their control, and are also in like manner empowered to lay down sewers in such highways, with the necessary man-holes and gratings, can keep the two in combination (i.e., the highways and gratings) in such a condition as to cause injury to persons lawfully using the highways, and yet not be liable to an action for damages at the suit of the persons injured. I take it that the answer offhand would be No. But when the facts of these cases are applied to principles long since established, the answer must be Yes. The learned county court judge found for the plaintiffs on the authority of the case of *Kent* v. *Worthing Local Board* (1), and the Divisional Court gave a pro formâ judgment affirming the county court judge, leaving it to this Court to say whether that case was still law.

The material facts, as found by the county court judge, are as follows: "That the gratings over the man-holes in the highways over which the plaintiffs' horses fell had been properly inserted by the defendants as sewer authority, and were in good repair,

(1) 10 Q. B. D. 118.

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order, and condition, but that the road around the gratings in course of time had worn away, and in consequence the gratings projected above the roads and formed a stumbling-block; that it was the duty of the local board as the road authority to have made up the roads from time to time as they wore away; that this they had omitted to do, and so the accidents happened, and that they were attributable solely to the neglect of the local board as road authority to maintain the roads in proper order, and not to any default on their part as sewer authority." It has been held for, at any rate, over 100 years, dating from the case of *Russell* v. *Men of Devon* (1), that no action for damages will lie against a surveyor of highways for injuries received by reason of a highway being out of repair. It is now beyond doubt the law that where a person, though lawfully using a highway, is damaged, either as regards himself, his horse, or his carriage, merely by reason of the non-repair of a highway, he has no action at law for damages against any one. His sole remedy is by indictment against the parish which has made default, or he may proceed against the surveyor under s. 94 of the Highway Act for penalties. Damages he can recover against no one if his injury be caused by reason of mere non-repair. It is not denied by the plaintiff that the present defendants are surveyors of the highways in their district and acted as such over the highways in question.

In the year 1870 it had been held by the Court of Queen's Bench in *Gibson* v. *Mayor of Preston* (2) that a local authority who were constituted surveyors of highways by the Public Health Act of 1848 had the same immunity from actions for damages as a surveyor of highways; and last year the House of Lords, in *Cowley* v. *Newmarket Local Board* (3), affirmed *Gibson's Case* (2), and conclusively settled that no action for damages will lie against any local board for merely allowing their highways to get out of repair.

After the decision of *Gibson's Case* (2) and before that of Cowley's, the following came up for determination: First, the case of *Kent* v. *Worthing Local Board*, in 1882 (4). In that case

(1) 2 T. R. 667.
(2) Law Rep. 5 Q. B. 218.
(3) [1892] A. C. 345.
(4) 10 Q. B. D. 118.

the local board were what I will for brevity call the water authority, and also the highway authority. The valve cover in that case had been lawfully placed by them in the highway; it was proper in itself, was originally properly fixed, and at the time of the accident was in proper order; but the local board had omitted to repair the road adjacent to the valve cover so that it projected up into the highway, and hence the accident. Field, J., and Stephen, J., held the defendants liable, relying upon the principle stated by the Privy Council in *Borough of Bathurst* v. *Macpherson* (1), viz., "That the duty was cast upon the borough of Bathurst of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which but for such artificial construction would not have existed, or at the least of protecting the public against the danger when it arose, either by filling up the hole or fencing it." If the case of *Kent* v. *Worthing Local Board* (2) had remained unchallenged there can be no doubt that the judgments of the county court judge are correct. It was, however, to say the least, most seriously impeached in this Court in the case of *Moore* v. *Lambeth Waterworks*. (3) It was there pointed out that in the case of *Borough of Bathurst* v. *Macpherson* (1), as also in the case of *White* v. *Hindley* (4), both of which were relied upon by Stephen, J., in delivering the judgment of the Court, the accident had happened by reason of a defect in the thing complained of, and it is not disputed that if the gratings over the man-holes in the present cases had been out of order, whereby the accidents had occurred, the defendants would be liable. It appears upon reading the judgments in *Moore* v. *Lambeth Waterworks* (3) that this Court expressly held that, as the fire-plug in that case was in perfect order at the time of the accident, which was caused, not by reason of any infirmity in the fire-plug, but by reason of the non-repair of the highway over which the defendants had no control, no action was maintainable against them, and so far overruled the decision in *Kent* v. *Worthing Local Board* (2), which had held that, although the valve was in perfect order when the accident happened, it was the duty of the local board

(1) 4 App. Cas. 256, 265.
(2) 10 Q. B. D. 118.
(3) 17 Q. B. D. 462.
(4) Law Rep. 10 Q. B. 219.

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if necessary, to cut it down or otherwise alter it if it came to project up into the highway, and that for breach of this duty an action was maintainable. This Court, however, threw out the point, which had not been suggested before, that perhaps *Kent* v. *Worthing Local Board* (1) might be upheld upon the ground that the defendants occupied the dual capacity of owners of the valve and owners of the highway, Lord Esher stating that, if *Kent's Case* (1) could not be supported upon the ground of the defendants being masters of both situations, he respectfully differed from it, and that it was wrongly decided. Lindley, L.J., said: "It may be that the principle of *Gibson* v. *Mayor of Preston* (2) does not apply to the road authority, where they have a control not only over the road, but over the thing which creates the nuisance . . . If *Kent's Case* (1) is not distinguishable from this case upon that ground, then in my opinion it is erroneous"; and Lopes, L.J., was of opinion that by the judgment they were then giving in *Moore's Case* (3) they were overruling *Kent's Case*. (1)

The point suggested by this Court in *Moore's Case* (3) now comes up for decision. But it was first argued for the plaintiffs that there was no such thing as a highway authority as distinct from a sewer authority, that a local authority is represented by the mayor, aldermen, and burgesses acting as an urban sanitary authority, that the highways are vested in them, and that they can do what they like with their highways (s. 149), irrespective of being surveyors of highways, and that these actions were therefore maintainable against them wholly apart from their being surveyors of highways. These arguments are those urged in the Queen's Bench in the case of *Gibson* v. *Mayor of Preston* (2), yet the judgment was that, as the local authority were de facto surveyors of highways, they were not liable to an action for damages occasioned by reason of non-repair of the highway, and that the Public Health Act of 1848 had not imposed upon a local authority any further liability as to this than that attached to a surveyor of highways. That this judgment was correct is now settled by the case in the House of Lords last year, viz., *Cowley* v. *Newmarket Local Board*. (4) It was sought in that case to

(1) 10 Q. B. D. 118.
(2) Law Rep. 5 Q. B. 218.
(3) 17 Q. B. D. 462.
(4) [1892] A. C. 345.

overrule *Gibson* v. *Mayor of Preston* (1), but without success. The same arguments were again produced and with like results. In my opinion, the invalidity of these arguments has been judicially determined by the Queen's Bench and by the House of Lords. The plaintiffs next sought to rely upon a passage in Lord Blackburn's judgment in *Geddis* v. *Proprietors of the Bann Reservoir* (2), where that learned judge said: "It is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized negligently, and I think that if by a reasonable exercise of the powers, either given by statute to the promoters or which they have at common law, the damage could be prevented, it is within this rule 'negligence' not to make such reasonable exercise of their powers." I do not doubt this as a general proposition; but I must point out that Lord Blackburn was not dealing with the case of the liability or non-liability of surveyors of highways, which is in itself peculiar. If this general proposition be applied to the case of a surveyor of highways, it appears to me that his immunity from being sued for non-feasance would be gone. By a reasonable exercise of his powers he could always repair a highway, and according to that proposition he would be guilty of negligence and liable to be sued if he did not do so; but this is not the law. Moreover, this same argument was addressed to the House of Lords in *Cowley's Case* (3), and, though the case of *Geddis* v. *Proprietors of the Bann Reservoir* (2) was not cited, others to the like effect were. It will be seen that they were dealt with by Lord Herschell at p. 352 of the report, and held not to apply. Lord Herschell, in quoting Lord Cairns, states "that much must depend on the purview of the legislature in the particular statute and the language which they have there employed." When examined, it will be seen that in the present cases the defendants have been guilty of no neglect of duty as regards the gratings; what they have been guilty of is a non-feasance as regards their highways, to which, as the county court

(1) Law Rep. 5 Q. B. 218. (2) 3 App. Cas. 430, at p. 455.
(3) [1892] A. C. 345.

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judge has found, the accidents which occurred to the plaintiffs were solely attributable. For this non-feasance, as above pointed out, no action can be maintained. If the gratings had been out of order in themselves it would have been the duty of the defendants, irrespective of being surveyors of highways, to have put them in order, or to have fenced round them till put in order, and if by neglect of such duty a passer-by had been injured he could have sued the defendants for damages; but as long as the gratings lawfully and properly put down remained in perfect order, *Moore* v. *Lambeth Waterworks* (1), in this Court, has decided there is no breach of duty in the defendants in leaving the gratings alone. If the defendants were to be held liable in these actions they would have to be held liable for the non-repair of their highways, and this cannot be done. In my judgment, for the reasons above, the defendants are not liable, and upon the facts of these cases it matters not whether the defendants were "masters of both situations" or not, and the case of *Kent* v. *Worthing Local Board* (2) was in reality overruled by *Moore* v. *Lambeth Waterworks* (1), as stated by Lopes, L.J. The case in this Court of *Moore* v. *Lambeth Waterworks* (1), standing, in my judgment *Kent* v. *Worthing Local Board* (2) cannot, and these appeals must therefore be allowed. I agree as to the costs.

DAVEY, L.J. In this case the corporation of Brighton are the urban sanitary authority, and as such have the control and management of the sewers and also the control and management of the streets. The county court judge finds that the man-hole or grid on which the plaintiff's pony stumbled was a proper cover, and there was no fault of construction on the part of the corporation, and that at the time of the accident it was in good repair, order, and condition, and that the accident was caused by reason of the road having worn away so that the man-hole projected at least one and a half inches above the road, or, in other words, the imperfection or want of repair was in the road and not in the man-hole.

The question is whether upon these facts the plaintiff is

(1) 17 Q. B. D. 462. (2) 10 Q. B. D. 118.

entitled to recover damages from the corporation of Brighton. The first question I ask myself is, What was the cause of the accident? It appears to me, notwithstanding the ingenious and able arguments of Mr. Graham and Mr. Bray, that there can only be one answer—it was the default of the corporation to keep the road in repair. But for this breach of duty no action will lie: *Cowley* v. *Newmarket Local Board.* (1) It is equally clear that if the Brighton Corporation had been only the sewer authority and not the road authority, no action would have lain against them: *Moore* v. *Lambeth Waterworks Co.* (2), a decision which is binding upon us and in which I entirely concur. I confess I am unable to see how the fact of the corporation being both the sewer authority and the road authority can impose a liability upon them which, if these were separate authorities, neither authority would in law be subject to. I therefore regard the case of *Kent* v. *Worthing Local Board* (3) as inconsistent with and impliedly overruled by the subsequent decision of this Court in *Moore* v. *Lambeth Waterworks Co.* (2), and, independently of that decision, it cannot be supported. The ratio decidendi in the *Worthing Case* (3) is stated in the following passage at p. 122: "We are, however, of opinion that the facts of this particular case do not bring it within the principle of *Gibson* v. *Mayor of Preston* (4), but do bring it within a different class of cases, of which *White* v. *Hindley* (5) and *Borough of Bathurst* v. *Macpherson* (6) are the most important. These cases appear to us to establish the principle that the water authority is under a legal obligation to make such arrangements that works of whatever nature under their care shall not become a nuisance to the highway, and that, if they happen to unite in themselves (as in the case with the Worthing Local Board) the double character of highway authorities and water authorities, their duty to do so is clearer than it would otherwise be," and some expressions in the judgment in *Borough of Bathurst* v. *Macpherson* (7), which have been cited at the bar in this case, are there quoted. In that case the accident

(1) [1892] A. C. 345.
(2) 17 Q. B. D. 462.
(3) 10 Q. B. D. 118.
(4) Law Rep. 5 Q. B. 218.
(5) Law Rep. 10 Q. B. 219.
(6) 4 App. Cas. 256.
(7) 4 App. Cas. 256, 265.

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was caused by the defective state of a barrel drain, which at once distinguishes it; and I am of opinion that the authorities cited in the *Worthing Case* (1) did not support the conclusion drawn from them: see per Lord Hobhouse in *Municipality of Pictou* v. *Geldert.* (2) It may be conceded that the corporation is under a legal obligation to make such arrangements that works of whatever nature under their care shall not become a nuisance. But the question remains, In what respect have the corporation failed to discharge this legal obligation, and is there any right of action in respect of such default? Turn the case any way you will, it seems to me that you come back to the proposition that the breach of duty was in not repairing the highway, and for that no action will lie.

In the Horsham case the facts and findings of the judge are substantially the same, and our decision in the Brighton case will apply to that case. Whether this is a satisfactory state of the law, I express no opinion. We have only to administer the law as it is.

I agree as to the costs.

Appeals allowed.

Solicitors for Horsham Local Board: *Field, Roscoe & Co., for Medwin, Davis, & Sadler, Horsham.*

Solicitors for corporation of Brighton: *Boxall & Boxall, for Town Clerk, Brighton.*

Solicitors for Oliver: *Cobbold & Woolley.*

Solicitor for Thompson: *T. A. Goodman, Brighton.*

(1) 10 Q. B. D. 118. (2) [1893] A. C. 524, 530.

H. C. J.

BLAKER *v.* TILLSTONE.

1894
Jan. 11.

Local Government — Offences — Unsound Meat — Exposure for Sale — Guilty Knowledge of Seller how far essential to Offence—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117.

Upon the hearing of a summons under s. 117 of the Public Health Act, 1875, charging a person with having had in his possession, and deposited on his premises, for the purpose of preparation for sale, and intended for the food of man, meat which was unsound and unfit for the food of man, it is not necessary to shew that the defendant had personal knowledge of the condition of the meat.

CASE stated by justices of the borough of Brighton under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, from which the following facts appeared.

The appellant had been summoned to answer an information preferred by the respondent under ss. 116 and 117 of the Public Health Act, 1875, and s. 28 of the Public Health Acts Amendment Act, 1890, charging him with having in his possession, and deposited upon his premises, for the purpose of preparation for sale, and intended for the food of man, certain beef which was unsound and unfit for the food of man.

The appellant was a manufacturer and seller of German sausages, and had a sausage factory in Duke Street and a shop in West Street, communicating by a private yard. While the meat in question was in process of conversion into sausages upon his premises, it was seized by the sanitary inspector as unsound and unfit for the food of man; it was afterwards found to be so by a justice of the peace, and condemned and ordered to be destroyed. There was no evidence that the appellant had seen the meat, or knew of his own knowledge what was its condition; but he was on his premises in West Street from time to time while the meat was on his adjoining factory in Duke Street until it was seized. The appellant's machine man who cut up the meat, and another of his servants who received and weighed it, must have known its condition, and if the appellant had not personal knowledge of it, he might and would have had it if he had

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exercised reasonable care. The justices convicted the appellant. If the Court was of opinion that, by reason of the absence of positive proof that the appellant had actual personal knowledge of the condition of the meat, he ought not to have been convicted, the conviction was to be quashed; otherwise, it was to stand.

Gore, for the appellant. The conviction was wrong: a guilty knowledge of the condition of the meat on the part of the person charged is an essential part of the offence, and must be imported into the statute. Primâ facie it is necessary to prove a mens rea; where the prosecution is relieved from that necessity, it must be by virtue of a provision expressed or necessarily implied in the statute under which the proceedings are taken. It is true, for example, that in prosecutions under s. 6 of the Sale of Food and Drugs Act, 1875, for selling to the prejudice of the purchaser articles not of the nature, substance, and quality of the article demanded, want of knowledge on the part of the seller is no defence; but that is because it is in express terms made a defence to charges under ss. 3 and 4 of that Act, from which the inference was drawn that the legislature did not intend it to be a defence under s. 6, which was silent upon the point: *Betts* v. *Armstead*. (1) In s. 116 of the present Act there is an express provision that proof that meat seized was not deposited for sale, or intended for the food of man, is to rest with the party charged; this express provision excludes the idea of the defendant, when charged under s. 117, being compelled to prove that he did not know it was diseased. Three things must concur before there can be a conviction: first, the meat must be bad, second, there must be knowledge of its condition on the part of the person charged, and, third, the meat must have been deposited for sale, or intended for the use of man; it is only the third that, by s. 116, the prosecution is relieved from the necessity of proving.

[DAY, J. If the destruction of the meat can be ordered without shewing guilty knowledge on the part of the owner,

(1) 20 Q. B. D. 771.

why should he not be fined for its possession without shewing a mens rea?]

Because the condemnation of the meat is a mere preliminary to the summons against the owner, and may be ordered without notice to him, and by a different justice: *White* v. *Redfern*. (1) By 9 & 10 Wm. 3, c. 41, s. 2, the unauthorized possession of government stores marked with a broad arrow is made a crime; yet it has been held that a person in possession of such stores cannot be convicted under that section unless there is sufficient evidence to shew that he knew they were so marked: *Reg.* v. *Sleep* (2); *Reg.* v. *Cohen*. (3) The only authority upon the present Act which is unfavourable to the appellant is a dictum of Stephen, J., in *Mallinson* v. *Carr* (4): "The short result is that a person in possession of meat intended for human food, and unfit for human food, is liable to conviction; and, for my own part, I think he is liable, whether he knows or does not know that the meat was unfit for human food." The dictum was, however, unnecessary for the decision of that case, and it is submitted is not good law.

[He also cited *Reg.* v. *Tolson*. (5)]

No one appeared for the respondent.

LORD COLERIDGE, C.J. I am clearly of opinion that our judgment should be for the respondent. It is impossible to deny that in cases arising under 9 & 10 Wm. 3, c. 41, s. 2, certain expressions have been used by judges of eminence shewing that, in their opinion, the knowledge by the accused of the presence of Admiralty marks on goods found in his possession was necessary to support a conviction under that section. But we are dealing now with a different statute, under which it is plain that without any inquiry into the guilty knowledge of the seller, and without issuing a summons against him or giving him any notice, a magistrate is empowered to order the destruction of his property; that was decided in *White* v. *Redfern* (1), and the words of the statute are express. The object of the Act is that people

(1) 5 Q. B. D. 15.
(2) L. & C. 44; 30 L. J. (M.C.) 170.
(3) 8 Cox, C. C. 41.
(4) [1891] 1 Q. B. 48.
(5) 23 Q. B. D. 168.

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shall not be exposed to the danger of eating and drinking poison, that anything which is likely to injure life shall not be sold. The question for us is whether the magistrate is bound to insist on direct proof of knowledge on the part of the seller of the bad condition of the stuff sold. Perhaps it might be an answer to this contention to say that the Act of Parliament would be nugatory if such proof were insisted on, for it would then always be open to the defendant to say that he was not aware of the condition of the article sold, and that it was not his duty under the statute to make any inquiries on the point, with the obvious result that a man might in practice go on selling meat which was positively injurious without the possibility of getting a conviction against him. The Act would thus be made nugatory; but that would be no answer if its meaning were clear, though it would be a reason for holding (if it were open to us to do so) that that could not be the meaning of the Act. Without going into the cases decided on the statute relating to bigamy or on other statutes, it is sufficient to say that this case is upon a wholly different statute, which relates to a subject-matter very analogous to that of the sale of Food and Drugs Act, 1875, under which it has been expressly decided that a person charged under s. 6 with selling a thing not of the nature, substance, and quality of the article demanded need not be shewn to have known of the adulteration.

In cases arising under the Act of Wm. 3, it has been held that, although there is a way provided in that statute by which a person in possession of Admiralty stores can free himself from a charge brought against him, that is, by obtaining a certificate from the proper government authorities, that fact is not sufficient to justify the Court in dispensing with proof of guilty knowledge. I defer to that decision, and express no opinion as to its propriety. If this conviction were under the same statute, that decision would be binding on us; but we are dealing with a statute passed for the protection of the public, the purpose of which would be defeated if it were necessary to shew a guilty knowledge in the seller; and we are free to say that the decisions under the Act of Wm. 3 are not in point, being decisions under a statute having a different object—the protection of the Queen's

stores. I think, therefore, that the question asked us must be answered in the negative, and that this conviction must stand. 1894 BLAKER v. TILLSTONE.

DAY, J., concurred.

Judgment for the respondent.

Solicitors for appellant: *Prince & Plumbridge.*

W. J. B.

SALE *v.* PHILLIPS. 1894 *Jan.* 26.

Local Government—Local Authority—Expenses of Use of Fire-engine—"Owner"—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 33.

By s. 33 of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), the expense incurred by the commissioners in sending engines beyond the limits of the special Act for extinguishing fire in the neighbourhood is to be borne by "the owners of the land or buildings where such fire shall have happened."

By s. 171 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), the provisions of the Town Police Clauses Act, 1847, with respect to fires are incorporated with that Act, and by s. 4 of that Act "owner" is defined as "the person receiving the rackrent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rackrent":—

Held, overruling *Lewis* v. *Arnold* (Law Rep. 10 Q. B. 245), that the expense incurred by the commissioners was to be borne by the "owners" of the land or buildings as defined in the Public Health Act, 1875, and that the definition did not include an occupier of such land or buildings as tenant from year to year.

CASE stated by justices of Leominster.

The appellant, the town clerk of the borough, claimed, under s. 33 of the Town Police Clauses Act, 1847, payment by the respondent, the occupier as tenant from year to year of a farm in the neighbourhood, of the expense incurred by the corporation in sending a fire-engine to extinguish a fire there. He contended, on the authority of *Lewis* v. *Arnold* (1), that the respondent was "the owner" within the meaning of the section. The justices held that the landlord of the farm was liable.

Corner, for the appellant, relied on *Lewis* v. *Arnold*. (1)

Bosanquet, Q.C., for the respondent. The provisions of the

(1) Law Rep. 10 Q. B. 245.

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Town Police Clauses Act, 1847, as to fires are, by s. 171 of the Public Health Act, 1875, incorporated with that Act, and the "owner" is by s. 4 defined to be the landlord. The case of *Lewis* v. *Arnold* (1) was decided per incuriam. At that time ss. 4 and 44 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), incorporated into the Act the same definition of "owner" from s. 2 of the Public Health Act, 1848 (11 & 12 Vict. c. 63); but it does not appear that this fact was brought to the attention of the Court.

LORD COLERIDGE, C.J. The appeal must be dismissed. It is clear that the justices were not bound by *Lewis* v. *Arnold.* (1) That case was decided under a misapprehension. The learned judges were not informed that an incorporated statute contained a definition of "owner" which made the landlord liable.

DAY, J., concurred.

Appeal dismissed.

Solicitor for the appellant: *H. Andrews, for Sale, Leominster.*

Solicitors for the respondent: *Chester, Mayhew, Broome, & Griffiths, for Weyman & Weyman, Ludlow.*

(1) Law Rep. 10 Q. B. 245.

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.

1893

Nov. 22, 24; *Dec.* 1.

PRESCOTT, DIMSDALE, CAVE, TUGWELL & CO., LIMITED, AND OTHERS *v.* THE BANK OF ENGLAND.

Bank of England—Bankers—Composition for loss of right to issue Bank-Notes—Consolidation of Firms into Joint Stock Company—Bank of England Charter Act, 1844 (7 *&* 8 *Vict. c.* 32), *ss.* 10, 11, 12, 23, 24, 25, 28—19 *&* 20 *Vict. c.* 20—27 *&* 28 *Vict. c.* 32.

The Bank Charter Act, 1844, ss. 23, 24, provides for the payment by the Bank of England of annual compositions to certain bankers as the compensation for the loss of their privilege of issuing their own bank-notes:—

Held, that such compositions cease to be payable if and when such bankers cease to carry on business.

A company was incorporated for the purpose of purchasing and carrying on the business of four banks—two of which carried on business in London, one at Bristol, and one at Bath. The Bristol bank was entitled, under s. 24 and the Bath bank under s. 23 of the Bank of England Charter Act, 1844, to be paid by the Bank of England a composition for having ceased to issue their own bank-notes. The four firms agreed to sell their businesses to the company when formed, the consideration being the allotment to them of shares in the company, and also agreed that they would not in future carry on business as bankers. This agreement was adopted by the company when formed, and the businesses of the four banks were thenceforth carried on by the company in its own name at the same places as before and with the same staffs of clerks:—

Held, that the banks must be taken to have ceased to carry on their business, and that the company was not entitled to be paid any composition by the Bank of England.

In re Capital and Counties Bank (61 L. T. (N.S.) 516) distinguished.

APPEAL by the defendants, the Bank of England, from the judgment of Cave, J., holding them still liable to pay certain compositions under the Bank Charter Act, 1844.

At the trial of the action, it appeared that in 1890 there were in existence five banking firms—Prescott & Co. and Dimsdale & Co., carrying on business in London, neither of which was entitled to issue bank-notes or to any compensation for not issuing them; Miles & Co., of Bristol and Clifton, who made an arrangement after the passing of the Bank Charter Act to discontinue issuing notes, and were entitled to compensation under s. 24, the maximum being 895*l.* per annum; Tugwell & Co., of Bath, who were named in Schedule C to the Act, and had arranged

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before the Act to cease issuing notes, and were entitled under s. 23 (1) to compensation, the maximum being 630*l.*; and Deane & Co., of Winchester, also named in Schedule C, and entitled to compensation under s. 23, the maximum being 100*l.* per annum.

In 1890 the four first above-named firms agreed to consolidate their businesses, and for that purpose to form and incorporate a joint stock company. On December 3, 1890, the four firms entered into an agreement with a Mr. Lord, as trustee for the intended company.

This agreement recited that the firms had "determined to transfer the respective goodwills of their respective businesses, and such of the other assets of the same businesses as are hereafter specified," to a company intended to be formed. Clause 1 provided that each of the firms should sell and the company should purchase as from December 31, 1890, the goodwill of the banking business carried on by that firm. Clause 2: "As the consideration for the sale the vendors shall be entitled to the rights conferred upon them by the 8th clause." Then clause 3 provided that the company should have the right to occupy the places of business of the several firms for a twelvemonth. Clause 4 provided that the company should take over the furniture and office-fittings, stationery, &c. Clause 5: "Each of the said firms, parties hereto of the first four parts, shall satisfy and discharge all the debts and liabilities of its said business existing on the said 31st day of December, 1890, and shall for that purpose be

(1) Sect. 23: "And whereas the several bankers named in the schedule hereunto annexed have ceased to issue their own bank-notes under certain agreements with the Governor and Company of the Bank of England, and it is expedient that such agreements should cease and determine . . . and that such bankers should receive by way of compensation such composition as hereafter mentioned . . . . Be it therefore enacted, that the several agreements subsisting between the said Governor and Company and the several bankers mentioned in the schedule hereto relating to the issue of Bank of England notes shall cease and determine . . . . and the said Governor and Company shall pay and allow to the several bankers named in the schedule, as long as such bankers shall be willing to receive the same, a composition at and after the rate of 1*l.* per cent. per annum on the average amount of the Bank of England notes issued by such bankers respectively, and actually remaining in circulation, to be ascertained as follows." (Then follow provisions for ascertaining from time to time the average amount of such notes.)

entitled free of cost to the services of the clerks and other officers of the company. The company shall in the ordinary course of business collect on behalf of each of the said firms the book and other debts owing to such firm in respect of its said business on the said 31st day of December, 1890 (and in collecting any such debt the company may have regard to the length of credit usually given by such firm to the person liable in respect of such debt), and pay the same to such firm free of cost; but this clause shall not impose any liability on the company to take any legal proceedings for the recovery of any such debt." Clause 6: "The purchase shall be completed on the 1st day of January, 1891, when the vendors shall, at the request and cost of the company, execute and do all such assurances and things as may reasonably be required by the company for vesting in or delivering to it the property hereby agreed to be sold, and giving to it the full benefit of this agreement." Clause 7: "The company shall as from the said 31st day of December, 1890, take over and adopt all the then current engagements of each of the said firms—Messrs. Prescott, Messrs. Dimsdale, Messrs. Miles, and Messrs. Tugwell—relative to the employment of clerks and others in the business." Clause 8: "On the completion of the purchase each of the vendors shall be entitled to and shall accept an allotment of the shares in the company set opposite his name in the 5th schedule hereto, subject to the payment of the full nominal amounts of such shares as and when the same shall from time to time be called up, together with a premium of 4*l.* per share." There followed a proviso as to subscribing the company's memorandum of association. Clause 9: "None of the vendors shall without the previous consent of the directors for the time being of the company, or such number of them as have authority to bind the company, at any time after the completion of the purchase, either solely or jointly with, or as manager or agent or director for, any other person or persons or company, directly or indirectly carry on or be engaged or concerned or interested (except as a shareholder in any company) in any banking business or in any business similar to any of the businesses whereof the goodwill is hereby agreed to be sold, and shall not permit or suffer his name to be used or employed in carrying on or in

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connection with any such business in London or within fifty miles from the Bank of England, or in any of the counties of Gloucester, Somerset, and Wilts, or within fifty miles of any of such counties, save in so far as he shall as a member of the company be interested in, or as an officer of the company be engaged in, the company's business; and none of the vendors shall do or suffer to be done anything whereby the company may be injured in carrying on any of the businesses hereby agreed to be sold; but each of the vendors shall at the cost of the company do all things which the company may reasonably require for securing to it and its assigns the full benefit of the goodwills hereby agreed to be sold."

On December 23, 1890, the projected company was registered as Prescott, Dimsdale, Cave, Tugwell & Co., Limited. Its objects as stated in the memorandum of association were to acquire and carry on the businesses then carried on by Prescott & Co., Dimsdale & Co., Miles & Co., and Tugwell & Co., and to carry on the business of bankers in London, Bristol, Clifton, and Bath, and such other places as might from time to time be determined. The 4th article provided that the directors should forthwith adopt the agreement of December 3, 1890. By an agreement dated January 5, 1891, between the new company and the four firms, the company undertook to carry out the agreement of December 3, 1890.

On June 8, 1891, the company entered into an agreement with Deane & Co. for the purchase of their business. The agreement was of the same nature as that entered into with the other firms.

These agreements were acted upon. The company took possession of the several places of business of the five firms, and at each of those places the business was carried on as before with the same staff of clerks, there being in fact no apparent change except that the name of the company was substituted for that of the old firm. Down to the formation of the company the Bank of England paid the yearly compensation to the three firms entitled to it, but refused to make any payment for 1891. In May, 1892, this action was commenced by the company, Miles & Co., Tugwell & Co., and Dean & Co., as co-plaintiffs, claiming

the aggregate amount of the three compositions, and in the alternative the three firms severally claimed their several compositions.

The Bank of England, by their defence, alleged that the several firms had ceased to exist and to carry on the business of bankers and to issue and keep in circulation Bank of England notes; that at the passing of the Bank Charter Act, each of those firms consisted of fewer than six persons; and that, if such firms now existed, they consisted of more than six persons, and, moreover, if they carried on business, they carried it on in London, and their right (if any) to issue notes had thereby become extinguished, and that no composition was now payable.

The learned judge considered that the case was governed by the decision of Bowen, L.J., in *In re Capital and Counties Bank* (1), and gave judgment that the plaintiffs should recover 1625*l.*, the amount of the three compositions for 1891, with a declaration that the several compositions had not been determined by the acts of the firms, and that the company was entitled to payment of the compositions from time to time if not previously determined by its own act, until Parliament should prohibit the issue of bank-notes as defined by s. 28 of the Bank Charter Act, 1844, or until the exclusive privileges of the defendants mentioned in s. 27 should be determined.

The defendants appealed.

Sir John Rigby, S.G., *Greene, Q.C.*, *Sutton*, and *R. M. Bray*, for the defendants. There is no firm now in existence which was carrying on business at the time when the composition was fixed. Moreover, the right to compensation must depend on the continuance of circumstances which, if the agreement had not been entered into, would have entitled the plaintiffs to go on issuing their own bank-notes. In 1890 there were four firms: Prescott & Co., who had no right to issue notes and no title to compensation; Dimsdale & Co., who were in the same position; Miles & Co., of Bristol and Clifton, who were entitled to compensation under s. 24 of the Bank Charter Act, 1844; and Tugwell & Co., of Bath, who received compensation by an agreement made

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before the Act, and were therefore within s. 23 of the Act. The contention of the plaintiffs is that the business of these firms is still carried on by the company, and that under the Bank Charter Act, 1844 (7 & 8 Vict. c. 32), ss. 11, 23, 24, the compositions continue payable. In a sense it is true that those businesses are carried on; but it cannot be said that in the legal sense of the term any of those firms are carrying on business, for they have expressly agreed not to carry on their businesses. By ss. 23 and 24, the composition is a variable amount, depending on the number of Bank of England notes issued by the firm to which it is payable; and how can this be ascertained when the business is merged in the business of a company? It is true that under s. 11 a firm does not lose its right to issue its own bank-notes by a change in its personal composition; but it does lose it by ceasing to carry on business, and cannot recover the right. The firms here have ceased to carry on business, for they have sold their businesses to a purchaser; if, therefore, they had been issuing their own notes, the right to do so would have ceased upon their giving up their businesses, and though the Act does not in terms say that the composition is to cease by events which would have determined the right to issue notes, it cannot be considered to continue longer than the right for which it is a compensation. If the business of the dissolved firms is carried on, it is carried on in London, and by more than six persons. Cave, J., decided in deference to *In re Capital and Counties Bank* (1); but that case is wholly distinguishable from the present. The question there was whether the company was not the same body throughout; and Bowen, L.J., came to the conclusion that it was. It is impossible to come to a similar conclusion in the present case. It cannot be said that the present company is Miles & Co. or Tugwell & Co., registered by a different name under the Companies Act, 1862. The questions arise, Were the parties claiming the composition "such bankers" within the meaning of ss. 23 and 24, and did they issue Bank of England notes within the period for which they claim the composition? How are the plaintiffs "such bankers"? If the company is entitled, it must be because it is identical with one of

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the firms, as it was held in the *Capital and Counties Bank Case* (1) that the company was identical with the old firm; but here the company is a new creature formed by the aggregation of the partners in the old firms. Then, as to the old firms being entitled, they did all they could to extinguish their businesses, and bound themselves not to carry on the business of banking. Again, the right to compensation depends on taking an account. An account cannot be taken on behalf of Tugwell & Co. or Miles & Co. after they have ceased to carry on business, and a new corporation cannot claim in their stead. In *Attorney General* v. *Birkbeck* (2) it was held that a firm which had made over its business could not by arrangement with the assignee continue the issuing of notes.

Two views are put forward as to the meaning of the statute with respect to compensation. One is, that compensation is in lieu of a right to issue notes, and that when any act is done which apart from the agreement with the Bank of England would put an end to the right to issue notes the compensation comes to an end. The other is, that the right to composition is independent of this condition. The Act is not clear: it says that the composition shall be paid "so long as such bankers shall be willing to receive the same"—which is a very obscure expression. The meaning which the defendants suggest is that it means that while they receive the composition they must not do anything which would destroy their right to issue notes. The Act 27 & 28 Vict. c. 32, was passed to clear up doubts, and the preamble shews the nature of the doubts that were entertained. It may have been intended to shew that, if they gave up the composition they should be remitted to all their rights except that of issuing bank-notes. Here the business is carried on in London, and by more than six persons. If the right to composition is independent of the continuance of circumstances which would enable the bank to go on issuing notes, it is a personal right, and cannot go to any one but the original firm. The plaintiffs cannot rely on s. 11, for it relates only to the right to issue notes; and if the right to compensation is independent of the continuance of that right, the section has

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no bearing, except that it may throw some light on what the legislature meant by the expression "such bankers."

Sir H. James, Q.C., Finlay, Q.C., and *G. Wood Hill*, for the plaintiffs. The plaintiffs seek to put a narrow construction on the words "such bankers" in ss. 23 and 24 of the Act of 1844. A valuable privilege having been resigned, it was not intended that the right to compensation should cease if the constitution of the firm entitled to it was changed. At the time when the Act 19 & 20 Vict. c. 20, was passed there must have been extensive changes in the constitution of most of the firms to which a composition was payable, yet that Act provides for continuance of the composition. This shews that the expression "such bankers" must be taken in an impersonal sense, and that it was intended to attach the composition to the business. It can make no difference whether the business is carried on by a firm from which all the old partners have been gradually eliminated, or by a new joint stock company. The right is attached to the business the goodwill of which included the right of compensation. The defendants contend that the old partnerships are gone; but if a continuing firm consisting of different members retains the right, why should two firms lose it by coalescing? The old businesses are being carried on—the object of the company, as stated in its memorandum of association, was to acquire and carry them on; and they have been carried on in the same places as before, and by the same staffs of clerks. It is urged that the composition cannot be computed; but there is no more difficulty in making the computation than before the company was formed, each business being carried on as a distinct business.

Again, the condition that a firm which has become entitled to a composition must remain in a position to issue bank-notes is not to be found in the Act. The compensation was to be given for a valuable consideration—the giving up the right to issue bank-notes—and the resignation of that privilege cannot be revoked. What, then, is there to entitle the Bank of England to say that the continuance of the composition is conditional on the continuance of a certain state of things? The words "so long as such bankers shall be willing to receive the same" may refer to

this, that a bank might choose to forego the composition rather than have its accounts investigated. Sect. 23 says distinctly that the composition shall be paid so long as the bankers are willing to receive it, and as regards the scheduled banks there is no trace of any other condition. As to other banks, by s. 25 the composition is to continue till such time as therein mentioned, "if not previously determined by the act of such bankers as herebefore provided." There is nothing to meet these words except the words "so long as such bankers shall be willing to receive the same." If the legislature intended to impose such limitations as the appellants contend for, why did it not express them? *Attorney General* v. *Birkbeck* (1) has little to do with the case. The Craven Bank were trying to elude the Act by saying that they issued notes as agents of the Birkbeck Bank, and the Court regarded the arrangement as a sham. So long as there is a person willing to receive the composition it must be paid, subject to two conditions—one implied from the words "such bankers," and the other a positive limitation as to time. The exception "such bankers" merely denotes that the same business must be going on.

[LINDLEY, L.J. Sect. 11 does not mention a transfer of the business to somebody else.]

Sect. 11 must be read with regard to 9 Geo. 4, c. 23, s. 4: the licence to issue notes continues if the business continues. The defendants seek to impose a condition that the plaintiffs must continue to be in a position to issue notes. That would be intelligible if the question related to the power to issue notes; but as matters stand it is irrelevant, for the plaintiffs never can again issue notes under any circumstances.

Sir J. Rigby, S.G., in reply.

Cur. adv. vult.

1893. Dec. 1. LINDLEY, L.J. This is an appeal by the defendants against a judgment of Cave, J., deciding that the plaintiffs are entitled to be paid by the defendants certain annual sums of money under ss. 23 and 24 of the Bank Charter Act, 1844 (7 & 8 Vict. c. 32). [The Lord Justice then referred

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to ss. 10, 11, 12, and to 23, 24, 25, 28 of the Act, and to 19 & 20 Vict. c. 20, s. 2, and stated the facts of the present case to the same effect as above.]

The question is whether the foregoing compositions are still payable either to the plaintiff company or to those old firms. The defendants contend that the old firms ceased to carry on business when they assigned their businesses to the plaintiff company, and that the compositions thereupon ceased to be payable, and in support of this view the defendants rely on *Attorney General* v. *Birkbeck*. (1) The plaintiffs contend that the new company is in fact only the old firms under another name, and that their business is still being carried on as before, and that the compositions have not ceased; and the plaintiffs rely on the decision of Lord Bowen in *In re Capital and Counties Bank*. (2) Cave, J., has adopted this view, holding that there is no material difference between the present case and that.

Lord Bowen certainly decided that a composition payable under the Act did not cease on the occurrence of any event which would have terminated the right of the bank receiving it to issue notes had there been no composition. It was strongly contended before us that in this respect the decision was wrong, and we were urged to overrule it. This question is, in my opinion, one of very great difficulty. It is not easy to see why the composition should continue longer than the right to issue notes could continue, and s. 25 seems to substitute one for the other. Moreover, the expression "unless previously determined by the acts of the bankers" is intelligible if the composition is to cease if they increase the number of their partners or come to London; but the expression is difficult to explain on any other construction. On the other hand, the later Act says when the composition is to cease, and it does not specify any such events as these which I have referred to, and only specifies the abolition by parliament of the right to issue notes. But in the view I take of the facts, it is unnecessary to decide whether the decision in *Capital and Counties Bank Case* (2) was right or wrong—on which I express no opinion, for I have come clearly to the

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conclusion that in this case the compositions have ceased to be payable.

Although the statute does not say in terms that the composition is to cease if the bankers entitled to it cease to carry on business; yet, if they do, then not only does the reason for paying the composition cease, but the machinery for ascertaining the composition comes to a stop. In this way it is made plain that the composition must cease to be payable in the event supposed. Whether the firms entitled to the composition have ceased to carry on business is a question of fact; and, having regard to the terms of their agreements with the plaintiff company and to Mr. Cave's evidence, I am clearly of opinion that they have. The businesses now carried on are carried on, not by the old firms, but by the new company, and this is so, not in a merely technical sense, but in the ordinary business sense of the expression. The very forms of the cheques now in use shew it. The former customers of the banks are now customers of the new company, and not of the old firms. The old firms have now no customers. The old businesses are carried on at the old places and with the old staffs; and the old places, formerly called and known as the old banks, are still so called and known. But the old banks, and other old places of business, are the property of the new company and not of the old firms, and the old staffs are the servants of the new company and not of the old firms. But the new company cannot by any legitimate method be brought within the class of bankers to whom the composition is made payable by the statute. As in the case of issue of notes (see s. 11), so in the case of the compositions, a firm of bankers would not lose its rights by a change in its composition. But when a firm sells its business to somebody else, and for that or any other reason ceases to carry on its business in the ordinary sense of that expression, it loses its right to any composition in future.

This conclusion is not at all opposed to Lord Bowen's decision, and the difference between the case before him and the present is not refined or immaterial, but is broad and all-important. The Capital and Counties Bank was an old firm which, the learned Lord held, had preserved its identity notwithstanding the change of name and other changes, and which old firm was registered as

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an existing firm under Part VII. of the Companies Act, 1862, and, this being so, the rights and obligations of the old firm became the rights and obligations of the registered company (see s. 193). But the present company is an entirely new company, formed and registered as such under Part I. of the Act, and having no rights or obligations except such as it acquires or incurs after registration. It cannot itself acquire a new right to be paid a composition under the Act of 1844; and the old firms have, by ceasing to carry on business, lost their right to its continuance. Having done so, they have no right to any composition which they can enjoy themselves or transfer to others.

The appeal ought to be allowed, and with costs here and below.

A. L. SMITH, L.J. Learned and elaborate arguments have been presented to us by the Solicitor General and Mr. Greene, on behalf of the Bank of England, as to what is or is not the true construction of many sections of the Bank Act of 1844 (7 & 8 Vict. c. 32), an Act which on all hands is admitted to be one difficult of construction; and, having listened to them, and to Sir Henry James, who argued for the plaintiffs, I have arrived at the conclusion that the first question to be decided is whether the plaintiffs, Messrs. Prescott, Dimsdale, Cave, Tugwell & Company, Limited, are the "such banker or bankers" as the three old banks who are their co-plaintiffs—viz., the Bristol bank, the Bath bank, and Winchester bank—were prior to December 3, 1890. Sir Henry James admitted if it was not, he could not support the judgment of Cave, J., in his favour; and in this I agree.

I will deal with the three co-plaintiff banks hereafter.

Now, what do the terms "such banker or bankers," as used in ss. 23 and 24 of the Act, mean? On the one side the Solicitor General was inclined to argue that to constitute "such bankers" the identical members of the firms must continue to exist as at the date of the passing of the Act to entitle such bankers to a composition—a proposition which, in my judgment, is wholly untenable; and I hold this without referring to s. 11, which may or may not be legitimate to refer to, though I think it is for

the purpose of throwing light upon the term, "such bankers or such banker," in ss. 23 and 24. On the other side it was urged that the term "such bankers" denoted the business carried on, and not the persons who carried it on, and that if the same banking business was carried on at the present time by the plaintiff company, limited, as prior to December 3, 1890, had been carried on by the three co-plaintiff old banks, apart from the other points which were raised, that would suffice to give the plaintiff company, limited, the right to those compositions which prior to the year 1890 the three old banks had enjoyed. In this I agree. This raises the first question in this cause, which is one of fact. Does the plaintiff company, limited, carry on the same banking business as the three old banks theretofore had done? In my opinion, there is no distinction to be made upon this point as to whether the banks were named in the schedule to the Act, and entitled to their composition under s. 23, as the Bath and Winchester banks were—or were not in the schedule, and entitled to composition under s. 24, as the Bristol bank was.

The material facts are as follows:—

Upon December 3, 1890, an agreement was entered into between Messrs. Prescott, Cave, Buxton, Loder & Co., who were bankers carrying on business in London—Messrs. Dimsdale, Fowler, Barnard & Co., also bankers carrying on business in London—the partners in the Bristol bank—the partners in the Bath bank—and a Mr. Lord, as trustee for a proposed company, limited (which thereafter became incorporated, and is the present plaintiff company, limited), that these four businesses should be bought up by the future company, limited, in consideration of certain shares in the proposed company, limited. The Winchester bank was subsequently bought up by the plaintiff company, limited, upon like terms, and stands in the same position as the Bath and Bristol banks. Neither of the two London banks bought up were entitled to a composition from the Bank of England. The three country banks were. By clause 9 of this agreement, it was provided that none of the partners of the bought-up banks, without the consent in writing of the directors of the proposed company, limited, should at any time after the

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completion of the purchase of the bought-up banks by the proposed company, limited, directly or indirectly, carry on or be engaged, or concerned or interested in, any banking business, or in any business similar to any of the businesses purchased, in London, or within fifty miles of the Bank of England, or in the counties of Gloucester, Somerset, or Wilts, or within fifty miles of any of such counties.

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To carry out the above-mentioned agreement the company, limited, was forthwith brought into existence. By its memorandum and articles of association, the objects for which the company, limited, was formed were declared, amongst others, to be, To acquire and carry on the respective businesses of the banks which were bought up; to carry on the business of bankers in London, Bristol, Clifton, or Bath; to acquire and undertake the whole or any part of the businesses of any person, partnership, or company carrying on any business which the company was authorized to carry on; and to amalgamate, or unite, or absorb into the company any other company or association for objects similar to any of the objects of the company; and by its articles of association the directors were to adopt the agreement of December 3, 1890.

In my judgment the effect of this was to bring about a complete dissolution of the old banks, and to swallow them up in the new company, limited, which was brought into existence for that express purpose. The identities of the bought-up banks were obliterated, their businesses were absorbed into that of the great company, limited, and they no longer existed upon the face of the earth. It was, however, contended that the new company, limited, now carries on the same banking business as the three old banks.

It was argued for the plaintiffs as follows. It was said, "Suppose one new partner taken into an old firm, that does not change its entity. Suppose two, three, or four, or more taken in, still the same entity remains, and the same banking business is carried on." I do not dispute that this may be so in many cases.

It was next said that the same result followed if two banks amalgamated with each other. It is here that I part company with the argument. I say an amalgamation between two

banks need not necessarily cause the business thereafter carried on to be the same as was theretofore carried on by either: it must depend upon the nature and character of the businesses amalgamated, and how the amalgamated business was subsequently carried on. In each case it must be a question of fact.

Where, as in the present, a large banking company, limited, is brought into existence for the purpose of absorbing into itself any lesser banking businesses, whether metropolitan or country, which it may find the owners willing to part with and sell to itself, and it does purchase and absorb them, it appears to me to be impossible with any degree of accuracy to say that the company, limited, after such absorption carries on the same banking business as the banks absorbed had theretofore done; for the simple fact is, it does nothing of the kind. The new company, limited, may have its branches in the same towns as the old absorbed banks had theretofore carried on their businesses; it may have procured for itself the old premises and the services of the old clerks; but how do these facts make the new business the same as the old? The name is changed upon the old premises, the liabilities to customers are altered, the documents and the cheques are all changed, the new name takes the place of the old, significantly declaring, as the fact is, that the old bank and its business is no more, and that the new company, limited, reigns in its stead.

Upon such a question as this each case must depend upon its own facts; and, in my judgment, this point upon the facts of this case can only be found against the plaintiffs, and it cannot be truly said that the plaintiff company, limited, is "such banker or bankers" as the old three firms formerly were; and it is not disputed that, if this be so, the plaintiff company, limited, is not entitled to the composition heretofore paid to the old banks, and which are sued for in the present action. Nor can the old firms who are made co-plaintiffs recover—for the obvious reason that they have ceased to exist, and consequently under the sections of the Act are no longer entitled to the composition.

The conclusion I have arrived at is in accord with some observations which fell from the Lord Chief Justice in *Attorney*

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General v. *Birkbeck* (1), with which I entirely agree. I do not run counter to the decision of (Lord) Bowen, L.J., given sitting at Nisi Prius in the *Capital and Counties Bank Case.* (2) He there held that the Hampshire Bank (which had the right to the composition), by absorbing other banks into itself, did not lose its identity, but still carried on the same banking business, although it changed its name and place of business. Here, on the contrary, the banks which had the right to composition are swallowed up and absorbed in a new company, limited, and no longer exist; and it is here that I find myself differing from my brother Cave when he held that the two cases were substantially identical.

It is not necessary to give any opinion in this case upon the other point determined by Lord Bowen, viz., whether the right to composition is commensurate with the right to issue notes. It is a point which I expressly leave open; it is not necessary to determine it in this case.

I think this appeal, for the reasons above, should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Dawes & Sons.*

Solicitors for defendants: *Freshfields & Williams.*

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H. C. J.

[IN THE COURT OF APPEAL.]

C. A.
1894
Jan. 16.

BRETT *v.* THE MONARCH INVESTMENT BUILDING SOCIETY.

Building Society—Deposits—Rule as to Withdrawal—"Available Balance in Hand insufficient to pay all the Depositors wishing to Withdraw"—Payment in Rotation according to Priority of Notices—Suspension of Right to bring Action to recover Deposit.

The rules of a building society provided, in the case of depositors who had given the prescribed notice to withdraw, that "if the available balance in hand shall be at any time insufficient to pay all the depositors wishing to withdraw, they shall be paid in rotation, according to the priority of their notices." A depositor gave notice of withdrawal, and his deposit not being repaid he brought an action to recover it:—

Held, by Lord Esher, M.R., and Lopes, L.J., Kay, L.J., doubting, that the fact that the available balance was insufficient to pay the depositors who had given prior notice to withdraw was an answer to the action.

APPEAL from a judgment of a Divisional Court, reversing a judgment given in the Mayor's Court of the city of London, in favour of the defendants.

The defendants were a building society, having power to receive money on deposit or loan within certain limits. The plaintiff deposited a sum of money with the defendants, subject to fourteen days' notice of withdrawal, and subject to certain conditions indorsed on the back of the application. One of these conditions was, "if the available balance in hand shall at any time be insufficient to pay all the depositors wishing to withdraw, they shall be paid in rotation, according to the priority of their notices."

The plaintiff gave the required notice to withdraw his deposit; but the society declined to pay him on the ground that under the 6th condition they were not bound to do so, as the available balance in hand was not sufficient to enable them to pay all the depositors who had given prior notices of withdrawal. At that time a very large number of depositors had given notice of withdrawal, their claims amounting in all to about 23,000*l.*, and the funds available were insufficient to pay that amount.

On the refusal of the society to pay him, the plaintiff commenced

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this action in the Mayor's Court to recover the deposit and interest, and a verdict and judgment passed for the defendants; but this judgment was reversed by the Divisional Court. The defendants had, since the commencement of the action, paid the plaintiff his claim, after paying off all the claims prior to his.

The defendants appealed.

1893. Nov. 2. *Channell, Q.C.*, and *Montague Lush*, for the defendants. The condition prescribes the mode in which a solvent company may meet the claims of the depositors. If the plaintiff and all other depositors were entitled to demand immediate payment and to bring actions in default, the condition is meaningless. The very expression "available balance" presupposes other funds which are not immediately available, but may be made so in time.

[They referred to *Walton* v. *Edge*. (1)]

W. Willis, Q.C., and *Cannot*, for the plaintiff. The condition as to the "available balance" refers only to the manner in which it is to be dealt with, and does not affect the right of a depositor who has given the requisite notice of withdrawal to bring an action in default of payment and to obtain judgment.

Channell, Q.C., in reply.

Cur. adv. vult.

1894. Jan. 16. LOPES, L.J. The Master of the Rolls concurs in the judgment I am about to read.

This action is brought to recover 140*l.* deposited with the defendants, and 1*l.* 11*s.* 9*d.* interest. The defendants admit that the sum of 141*l.* 11*s.* 9*d.* was at the end of fourteen days' demand primâ facie due to the plaintiff, but say that, having regard to the terms of the contract between them, the time for payment had not arrived when the action was brought. In other words, that the sum, though then due, was not then payable. Since the action was brought the whole amount has been paid to the plaintiff.

The case entirely depends on the construction to be placed

(1) 10 App. Cas. 33.

upon condition 6, which is indorsed on the application for a deposit account.

When there is an insufficient available balance in hand to pay all the depositors wishing to withdraw, does that condition only regulate the rotation of payment so as to prevent undue preference, or does it postpone the payment until there is an available balance in hand sufficient to pay depositors in rotation according to the priority of their notices?

The case was tried in the Mayor's Court by the Common Serjeant, and he adopted the latter alternative. There was then an appeal to the Divisional Court (consisting of Charles and Wright, JJ.), and they with hesitation adopted the former alternative.

After careful consideration, we find ourselves unable to agree with the construction put upon the condition by the Divisional Court.

The form of application for a deposit account is as follows: "Herewith I beg to hand you the sum of —— pounds, which I will thank you to place to my credit on deposit with the society at —— per cent. interest, subject to the conditions and terms specified on the back hereof, by which I agree to abide"—and then follows the signature of the applicant and other particulars. On the back the conditions are indorsed, and the following are material: "(3.) A deposit certificate, signed by three directors, and countersigned by the secretary, is given for each sum deposited, within the fourteen days following, in exchange for the interim certificate signed by the secretary. On withdrawal the deposit certificate has to be given up to the society. (4.) Interest will be calculated as follows: For deposits lodged for one year certain, subject thereafter to notice as below, four per cent. per annum. Fourteen days' notice for sums not exceeding 250*l*. One month's notice for sums exceeding 250*l*. (5.) Interest is calculated to within fourteen days of the date of the cheque drawn for repayment of deposits. (6.) Withdrawals of deposits are made upon the same principle as applies to the withdrawal of shares, viz., if the available balance in hand shall be at any time insufficient to pay all the depositors wishing to withdraw, they shall be paid in rotation, according to the priority of their

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notices." Receipts are given for the money deposited, and there are two forms in use. One of these states that the amount placed to the credit of the applicant's deposit account is subject to one month's notice of withdrawal, and to the rules and regulations bearing upon deposit accounts; while the other merely gives fourteen days as the time required for notice of withdrawal. The receipt in this case was, I think, in the latter form.

Condition 6 must be a material part of the contract, and it is beyond question that the money was deposited subject to that condition.

In construing this condition it is essential to bear in mind the nature and objects of the defendant company. The defendants are a building society created primarily for the purpose of advancing money to persons desirous of becoming possessed of their houses. The houses are mortgaged to the defendants, the money being repayable by instalments extending over a period of years. When the whole mortgage debt is repaid with interest the mortgagee becomes entitled in fee simple to his house. These instalments would come in by degrees and at fixed periods, and it would not be reasonable that a society having a right to borrow to the extent of two-thirds of the amount of their mortgages should be called upon suddenly to repay sums of money which they might not have in hand or under their immediate control. Such a contingency would not be beneficial either to the society or to the depositors. Owing to some panic or want of confidence there might at any time be a run upon the defendants which would end in their ruin if they could be called upon to pay all their depositors at once.

In the autumn of 1892, there was an uneasiness in the minds of depositors in various building societies, and the result was there was a steady application by depositors in this society to withdraw sums which they had deposited. It was proved at the trial that a sum amounting to 23,000*l.* was demanded from the defendants by depositors at the time the plaintiff sent in his application for repayment of his deposit.

If it were not for the 6th condition, it is clear that the plaintiff and each of these depositors, would have been entitled to have had their deposits repaid to them at once, and might then

and there have brought actions. The defendants rely on that condition, and say that they have by evidence brought themselves within it, and have thereby answered the primâ facie case of the plaintiff. Are they entitled to rely on this condition? We are of opinion that they are.

It was in our opinion proved, on behalf of the defendants, that at the time the plaintiff sent in his application the defendants, having regard to previous applications by other depositors, had no available balance in hand sufficient to pay the plaintiff's deposit.

The 6th condition in our judgment was annexed to the application for the express purpose of meeting a case like the present. It was inserted in order to meet any extraordinary run made on the society by terrified depositors, and to give the society time to meet such claims by postponing sudden and unexpected demands made upon them until money came to their hands to satisfy them. We cannot think that it was only intended, or that the true meaning of the condition is, to regulate the course of payment amongst depositors and thus to prevent any undue preference that would give it really no effect.

If all the depositors could bring their actions and recover their deposits at the same time, what was the advantage of the provision for rotation and priority?

The construction contended for by the plaintiff would afford no protection to the defendant society, and would leave it in the power of a certain number of panic-stricken depositors to wreck the society, which would not be for the interest of the society or of the depositors.

The condition means that the defendant society may postpone payment and the depositors' right to recover until there is an available balance in hand sufficient to pay depositors in rotation according to the priority of their notices.

The plaintiff brought his action too soon, and at a time when according to condition 6 the money, though due, was not payable.

We do not understand "available balance in hand" merely to mean money in the coffers of the defendant society, but money which without undue loss or undue delay they could

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realize, as, for example, money invested in Consols or any other security capable of being readily realized. "An available balance in hand" of this kind the defendant society did not possess at the time of the plaintiff's application, nor at the time when the action was brought.

The appeal must be allowed with costs.

KAY, L.J. The inclination of my opinion is to attach to condition 6 the meaning given to it by the Divisional Court rather than that put upon it by the other members of this Court. The condition is contained in a printed form supplied by the society to people who are willing to deposit money with them. The depositor in this particular case signed one of these forms when he made his deposit, and in doing so agreed to the conditions and terms specified on the back. These conditions were framed by the society, and they are responsible for the wording of them. In my opinion, the words "available balance" do not mean merely such cash as the society may have in hand, but include money that they can obtain by realizing investments, subject, however, to their right to retain the sums requisite for carrying on their business and paying their officials and meeting other necessary expenses. The expression "available" as applied to the balance indicates that what is intended is the balance after deducting the current expenses of the society.

The difficulty I have felt is, whether the 6th condition is so worded as to take away from a depositor his right of action to recover the deposit in respect of which he has given the proper notice of withdrawal, or whether sufficient effect is not given to the condition by limiting its application to the mode of dealing with the available balance by paying the applicants in rotation.

If the intention of the condition was to take away altogether the right of action in case the balance in hand was not sufficient to pay the depositor's claim, I think that should have been expressed much more plainly. It seems to me that the condition is capable of this construction: that if the available balance in hand is not sufficient at any given time to pay all the depositors who have given notice of withdrawal, they are to be paid in accordance with the order of their notices, so that the

society shall not be at liberty to prefer one depositor to another in an arbitrary way, as they might do without some such restriction. That is an advantage both to the depositors and to the society, and amounts to an intelligible rule as to the mode in which the available balance is to be distributed. On the whole I am more inclined to give to the 6th condition that restricted meaning than the wider one which would take away all right of action. I content myself with expressing my view, which differs in some respects from that taken by the other members of the Court.

Appeal allowed.

Solicitor for plaintiff: *Henshall Fereday.*
Solicitors for defendants: *Howard & Shelton.*

A. M.

SHAW *v.* THE GREAT WESTERN RAILWAY COMPANY.

1893 *Nov.* 21; *Dec.* 21.

Railway — Common Carrier — Liability — Loss of Goods by Theft of Company's Servants—Special Contract, Validity of—11 *Geo.* 4 *and* 1 *Wm.* 4, *c.* 68, *ss.* 1, 6, 8—*Railway and Canal Traffic Act* (17 *&* 18 *Vict. c.* 31), *s.* 7.

Sect. 7 of The Railway and Canal Traffic Act enacts that a railway company shall be liable, in the absence of a signed and reasonable contract for exemption, for the loss of any goods in the receiving, forwarding, or delivering thereof "occasioned by the neglect or default of such company or its servants":—

Held, that a loss of goods by the theft of a railway company's servant, without negligence on the part of the company, was not a loss "occasioned by the neglect or default of the company or its servants" within the meaning of s. 7, and therefore that the company could at common law protect themselves against liability by a special contract, although such contract was not reasonable within the requirement of the Act.

SPECIAL case stated for the opinion of the Court by consent of the parties, in an action to recover the value of certain articles delivered by the plaintiff to the defendant railway company for carriage.

The plaintiff is a married woman, and the jewellery and trinkets hereinafter mentioned were her separate property.

The defendants are a railway company incorporated under Acts of Parliament, and are common carriers.

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On August 29, 1892, the plaintiff delivered to the defendants at their station at Wooburn Green a portmanteau containing (amongst other things) jewellery and trinkets of the agreed value of 250*l.*, to be carried to the plaintiff's house at Bishops Stortford.

At the time the portmanteau was delivered to the defendants a consignment note for the same was duly signed for and on behalf of the plaintiff in which it was described as "1 box—Luggage."

The only material condition on the consignment note was as follows:—

"The Great Western Railway Company give public notice that they hold themselves entirely relieved from loss of or damage done to all goods, matters, or things described in the Act of Wm. 4, c. 68, unless the particular articles be declared, and an assurance over and above the carriage be paid as compensation for the risk incurred."

No declaration as to the nature of the contents of the portmanteau or their value was made by the plaintiff, or anyone on her behalf, at the time the portmanteau was delivered to the defendants; nor was any assurance, over and above the carriage, paid. Had a declaration been made that the portmanteau contained jewellery or trinkets over 10*l.* in value, it would not have been received by the company until the sum due for assurance over and above the carriage had been duly paid. Special precautions are taken by the defendants for the safe transit and due delivery of parcels containing articles in respect of which a declaration of value has been made and the sum due for assurance paid, but such precautions have not always been sufficient to ensure the due delivery of the goods.

The portmanteau was delivered at the plaintiff's house at Bishops Stortford; but on examination the jewellery and trinkets above mentioned were found to be missing.

The case went on to state that the jewellery and trinkets had been stolen by one of the defendants' servants whilst being taken in a van belonging to the defendants from Paddington station to Bishopsgate station in the course of the transit to Bishops Stortford.

The question for the opinion of the Court was whether, under the circumstances above set out, the defendants were liable to the plaintiff for the value of the jewellery and trinkets. If the defendants were held liable, judgment to be entered for the plaintiff for 250*l.*; if not, then judgment to be entered for the defendants.

Jelf, Q.C., and (by leave) *A. T. Lawrence*, for the defendants. Upon the facts stated in the case the defendants are not liable. Sect. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), does not apply to the limited class of goods mentioned in s. 1 of the Carriers Act, 1830 (11 Geo. 4 and 1 Wm. 4, c. 68). (1) Before the Act of 1830 common carriers were liable

(1) 11 Geo. 4 and 1 Wm. 4, c. 68, s. 1, provides that from and after the passing of the Act, "No . . . common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property" of certain specified descriptions (including jewellery and trinkets) "contained in any parcel or package, which shall have been delivered . . . to be carried for hire," when the value of such article or articles or property shall exceed 10*l.*, unless at the time of the delivery the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as thereinafter mentioned shall have been accepted by the person receiving such parcel or package.

Sect. 2 provides that the common carrier may demand and receive an increased rate of charge for the carriage of such parcel or package, to be notified by a public notice, to be placed in some conspicuous part of the place where such parcels or packages are received for conveyance, "stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles," &c.

Sect. 6: "Provided always . . . that nothing in this Act contained shall extend or be construed to annul or in anywise affect any special contract between such . . . common carrier and any other parties for the conveyance of goods and merchandizes."

Sect. 8.: "Provided also . . . that nothing in this Act shall be deemed to protect any . . . common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any . . . servant in his . . employ."

By 17 & 18 Vict. 31, s. 7, every railway company "shall be liable for the loss of, or for any injury done to, any . . . articles, goods, or things in the receiving, forwarding, or delivering thereof occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability . . . Provided always that nothing herein contained shall be construed to prevent the said companies

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for every kind of loss or damage to the goods carried, including loss of the goods by the theft of their servants; but they could protect themselves from liability by any special contracts with their customers: *Peek* v. *North Staffordshire Ry. Co.* (1) The Act of 1830 was passed to give additional protection to common carriers, and the right to make any special contract—even with respect to the class of goods mentioned in s. 1—is preserved by s. 6. Nor does s. 8 prohibit the making of any special contracts which shall protect the carrier in the case of loss of the goods by the theft of his servant. The words are "that nothing in this Act shall be deemed to protect" any common carrier from being liable for loss by such theft. That provision left untouched his right at common law to protect himself against such liability by any special contract, and it is not inconsistent with s. 6, which expressly preserves that right. That s. 7 of the Railway and Canal Traffic Act of 1854 was meant to apply only to goods other than those mentioned in s. 1 of the Act of 1830 is shewn by the proviso at the end of the section, that "nothing herein contained shall alter or affect the rights, privileges, or liabilities" of any railway company under the Act of 1830 "with respect to articles of the descriptions mentioned in the said Act." The meaning is that the power of the company at common law to protect itself from liability by any special contract is cut down with respect to the class of goods ordinarily carried by common carriers. In such cases the contract, in order to afford protection, must be signed and reasonable; but in respect of the special class of goods mentioned in the Carriers Act the power of the company

from making such conditions with respect to the receiving, forwarding, and delivering of any of the said . . . articles, goods, or things as shall be adjudged by the Court or judge before whom any question relating thereto shall be tried to be just and reasonable: . . . provided also that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any . . . articles, goods, or things as aforesaid shall be binding or affect any such party unless the same be signed by him, or by the person delivering such . . . articles, goods, or things respectively for carriage: provided also that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the Act, 11 Geo. 4 and 1 Wm. 4, c. 68, with respect to articles of the descriptions mentioned in the said Act."

(1) 10 H. L. C. 473; 32 L. J. (N.S.) (Q.B.) 241.

to protect itself by any special contract, whether reasonable or not, is preserved. The contract, therefore, in the present case, whether reasonable or not, is good, and protects the defendants from liability. In all the cases—except in *Baxendale* v. *Great Eastern Ry. Co.* (1), where the point was not taken—the contracts held unreasonable under the Act of 1854 were contracts with respect to goods not within s. 1 of the Act of 1830.

Next, if s. 7 of the Act of 1854 applies to this contract, it is submitted that the contract is a reasonable one. Its reasonableness or otherwise must be determined having regard to the thing contracted to be carried. It is not unreasonable with reference to the carriage of valuable jewellery. It provides an alternative payment by way of assurance.

Further, the plaintiff, by signing the consignment note and omitting to declare the contents of the portmanteau, must be taken to have asserted that the portmanteau did not contain jewellery, and she is, therefore, estopped by her conduct from setting up in the action that it did.

Lawson Walton, Q.C. (*Frankau*, with him), for the plaintiff. Before the Carriers Act of 1830 was passed a common carrier was an insurer of the goods he carried, the only exceptions being where loss or injury occurred through the act of God, or of the Queen's enemies, or through "inherent vice" in the goods themselves. The Carriers Act left that state of things untouched except in the cases specified in the Act. Assuming, for the purposes of the argument, that the right of making special contracts was unaffected by the Act, still to be valid the contract must be reasonable. This contract is not reasonable, because no alternative rate of carriage is provided. The sender of the goods must have the alternative of sending them at a lower rate without responsibility attaching to the company, or at a higher rate with responsibility attaching to the company. Here the defendants, by the contract, obtain immunity without any corresponding advantage to the sender, and the form of the contract renders it unreasonable, because it does not give express notice that the defendants will not be liable for the theft of their servants. The principles upon which contracts such as these are

(1) Law Rep. 4 Q. B. 244.

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to be held reasonable or unreasonable are stated in *Peek* v. *North Staffordshire Ry. Co.* (1); *Lewis* v. *Great Western Ry. Co.* (2) There is nothing in the last proviso in s. 7 of the Act of 1854 to limit the application of that section to the carriage of goods other than those specified in s. 1 of the Act of 1830.

A. T. Lawrence, replied.

Cur. adv. vult.

1893. Dec. 21. The judgment of the Court (Lawrance and Wright, JJ.) was read by

WRIGHT, J. In this case the plaintiff delivered to the defendants a portmanteau to be carried by them as common carriers of goods, and she paid their charge and signed a consignment note, on which was printed the common condition to the effect that the defendants hold themselves entirely relieved from loss or damage to goods of the kinds described in the Carriers Act, 1830, unless the articles are declared and an assurance paid as compensation for the risk incurred. The portmanteau contained things of the kinds mentioned in the condition to the value of more than 10*l.* The plaintiff did not declare them, or pay or tender any increase of charge in respect of them. The things were stolen in transit by a servant of the defendants without any negligence on the part of the defendants, and the question is whether the defendants are liable for the loss so caused.

It seems strange that such a case can at this day be open to discussion, but, upon examination, it is found to involve a question of difficulty which is not covered by authority, and was not argued before us.

The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, as interpreted in *Peek* v. *North Staffordshire Ry. Co.* (1), enacts in substance that, in the absence of a signed and reasonable contract for exemption, the railway company is to be liable for loss or injury to goods in the receiving, forwarding, or delivering thereof occasioned by the neglect or default of

(1) 10 H. L. C. 473; 32 L. J. (N.S.) (Q.B.) 241.
(2) 3 Q. B. D. 195.

the company or its servants. We are bound in this Court by *Ashendon* v. *London, Brighton, and South Coast Ry. Co.* (1) to hold that the signed contract in this case does not avail the defendants under s. 7 of the Railway and Canal Traffic Act, 1854, on the ground that it purports to relieve them from liability for every kind of negligence or default, however gross and however completely the loss may be unconnected with the fact of the goods being valuables, and does so without any equivalent or beneficial alternative, and is, therefore, unreasonable. But s. 7 of the Act of 1854 concludes with the proviso that "nothing herein contained shall alter or affect the rights, privileges, or liabilities" of a company "under" the Carriers Act, 1830, "with respect to articles of the descriptions mentioned in the said Act." The Act of 1830, s. 6, is as follows: "Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage-coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandizes." Sect. 8 says:— "Provided also, and be it further enacted, that nothing in this Act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for" theft by his servants; and it is argued that the contract in the present case is a special contract under s. 6 of the Act of 1830, and is saved by the proviso to s. 7 of the Act of 1854, and is not subject to the provisions of s. 8 of the Act of 1830. We are, however, bound by the decision of the Exchequer Chamber in *Baxendale* v. *Great Eastern Ry. Co.* (2) to hold that s. 6 of the Act of 1830 does not give validity to special contracts generally, but refers only to contracts by which the company voluntarily renounces the protection given by s. 1 of the Act. The rights or liabilities, therefore, of the defendants under this special contract are not rights or liabilities under the Carriers Act at all, and are not saved by the proviso to s. 7 of the Railway and Canal Traffic Act; and, even if a different construction could be put upon s. 6 of the Act of 1830, it would not avail the defendants; for, if the special contract derives its validity

(1) 5 Ex. D. 190. (2) Law Rep. 4 Q. B. 244.

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from s. 6, then it is subject to s. 8 of the same Act, and the defendants are expressly made liable for the theft of their servant.

A third point was raised, that the plaintiff is precluded from succeeding because she delivered valuables without declaring them, having notice that the company would not receive them unless declared and insured, and it was argued that this was a fraud, or that in some way the plaintiff was estopped. In the early part of the century this point was raised in many cases, and the decisions were conflicting; but since the case of *Walker* v. *Jackson* (1) it seems to have been regarded as settled law that a carrier cannot succeed on this ground in the absence of positive misrepresentation or other actual fraud, and the older decisions have dropped out of the books.

The defendants, therefore, fail on all of the grounds on which their case was argued.

But this does not dispose of the matter. It was indeed assumed in the argument on both sides that s. 7 of the Act of 1854 applies to the case unless it is excepted by the proviso. It appears to us, however, necessary to consider whether the principal enactment of s. 7 applies at all to theft by a servant of the carrier—whether that is within the expression "the neglect or default of such company or its servants," as used in that Act, and, for that purpose, to examine the state of the law with reference to which s. 7 was enacted. It is clear law that a common carrier by land is, in the absence of exemption by statute, contract, or notice, or on the ground of fraud, liable for all loss or damage to the goods which he carries for hire, the act of God, the Queen's public enemies, and "inherent vice" alone excepted; and he is, therefore, in the absence of such exemptions, liable at common law for loss by theft, whether by strangers or by his own servants. A dictum apparently to the contrary effect, attributed to Willes, J., in *Metcalfe* v. *London and Brighton Ry. Co.* (2), was afterwards disclaimed by him in a note to *Coggs* v. *Bernard.* (3) During the half-century which preceded the Carriers Act of 1830, it had, however, been established in many cases—e.g.,

(1) 10 M. & W. 161. (2) 4 C. B. (N.S.) 307, at pp. 309, 310.
(3) 1 Sm. L. C. 9th ed. p. 246.

Nicholson v. *Willan* (1), and *Harris* v. *Packwood* (2)—that the carrier could protect himself to some extent from liability for loss or damage (though not perhaps from an action for refusal to carry at the request of a customer, who could shew a tender of the goods at the carrier's office and an offer to pre-pay a reasonable charge there—see *Wyld* v. *Pickford* (3)) by insisting on a condition relieving him from liability; and for some time before 1830 it had become settled that he could do this by a mere public notice, although not "brought home" to the customer in any way. After the Act of 1830, it was necessary for him to shew a special contract for that purpose; but a general notice, "brought home" to the customer, was held to be a special contract, because the customer who sent his goods after notice of the condition was held to have assented to it: see per Blackburn, J., in *Peek* v. *North Staffordshire Ry. Co.* (4) The extent of the protection obtained by these contracts or notices was limited until about 1850. However general their terms, they were construed as covering only ordinary carrier's risks, or risks of the road, and not as extending to "gross" negligence, and a contract or notice expressly extending to "gross" negligence would have been held bad to that extent at any rate. Loss by theft by strangers, or by the carrier's servants, in the absence of gross negligence, was a risk of the road against which the contract or notice at common law protected the carrier entirely apart from the Act of 1830; and notwithstanding s. 8 of that Act, which merely excepted theft by the servant out of the protection given by the mere force of the statute itself, and not out of protection obtained by contracts not depending upon the statute for their validity: *Butt* v. *Great Western Ry. Co.* (5), as explained in *Metcalfe* v. *London and Brighton Ry. Co.* (6), and in *Great Western Ry. Co.* v. *Rimell* (7), and in the notes to *Coggs* v. *Bernard.* (8) By the end of 1852, however, it had, after much conflict of decisions, become settled by a series of cases (in the Queen's Bench: *Shaw* v. *York and North Midland Ry. Co.* (9), *Austin* v.

(1) 5 East, 507.
(2) 3 Taunt. 264.
(3) 8 M. & W. 443.
(4) 10 H. L. C. 473; 32 L. J. (N.S.) (Q.B.) 241.
(5) 11 C. B. 140.
(6) 4 C. B. (N.S.) 307.
(7) 18 C. B. 575.
(8) 1 Sm. L. C. 9th ed. p. 246.
(9) 13 Q. B. 347.

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Manchester, Sheffield, and Lincolnshire Ry. Co. (1), *Chippendale* v. *Lancashire and Yorkshire Ry. Co.* (2); in the Common Pleas, *Austin* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (3); and in the Exchequer, *Carr* v. *Lancashire and Yorkshire Ry. Co.* (4), which extended to contracts and notices the construction that had been applied in *Hinton* v. *Dibbin* (5) to s. 1 of the Act of 1830), that the protection afforded by these contracts or notices "brought home" to the customer might extend to negligence, however great, and that it made no difference whether the pleader alleged the negligence to be "gross" or not. After those decisions, the carriers' contracts or notices, when "brought home," protected them from everything except wilful acts, such as the conversion of the goods by the carrier himself, or by his agents for that purpose, or wilful misdelivery amounting to a renunciation of the character of bailee: see *Morritt* v. *North Eastern Ry. Co.* (6) and *Austin* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (3)

It was to correct this state of the law that the Railway and Canal Traffic Act of 1854 was passed. The legal warfare had been waged about negligence only, and there is some presumption that statutes passed to amend the law are directed against defects which have come into notice about the time when the statutes passed: see per Blackburn, J., in *Peek's Case.* (7) The language of the Act points in the same direction. The enactment is that the company is to be liable for loss or injury to goods "in the receiving, forwarding, or delivering thereof occasioned by the neglect or default of the company or its servants." These words are completely apt to describe every form of negligence, including theft by the company's servants, if occasioned or facilitated by negligence, and any default within the scope of the servants' employment; but they are not apt to describe theft without the company's negligence. For very many years carriers had been allowed to exempt themselves from liability for all risks of the road not occasioned by negligence, including theft by their

(1) 16 Q. B. 600.
(2) 21 L. J. Q.B. (N.S.) 22.
(3) 10 C. B. 454.
(4) 7 Ex. 707.
(5) 2 Q. B. 646.
(6) 1 Q. B. D. 302.
(7) 10 H. L. C. 473 32 L. J. (N.S.) (Q.B.) 241.

servants—*Butt* v. *Great Western Ry. Co.* (1)—subject only to the express enactments of the Act of 1830, and there is nothing to indicate that the law in this respect was thought to require amendment in respect of theft or any other of the risks of the road. If it was intended to make the companies liable for theft without their negligence, there is a strong contrast between the inaptitude of the words used in 1854 and the direct language of ss. 4 and 8 of the Act of 1830. Having regard to the terms of the Railway and Canal Traffic Act, and to the history of the law, and the occasion for the Act, it seems most reasonable to hold that it extends only to negligence, or default in the nature of negligence, or within the scope of the servants' employment. The company, therefore, as regards theft without negligence, are left in the same position in which they had been at common law for at least a hundred years in relation to such theft, and that is—that, subject in the case of the valuables specified in the Act of 1830 to the provisions of s. 8 of that Act, they can, by contract or notice "brought home," exempt themselves from liability for such theft. It may be added that s. 8 of the Act of 1830 cannot be construed as a general enactment that common carriers by land are in all cases to be liable for theft by their servants. The terms of the section confine it to the case of the valuables specified in the Act, and are in strong contrast with the language used in s. 4, which was intended to be general. This view was plainly the view of the Court in *Butt* v. *Great Western Ry. Co.* (1), and it must always have been the view of pleaders, because all the precedents of replications of felony by the carrier's servants are to pleas of the Carriers Act, and not to pleas of contracts at common law.

We are of opinion, therefore, that there must be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Yarde & Loader.*

Solicitor for defendants: *R. R. Nelson.*

(1) 11 C. B. 140.

W. A.

C. A.

1893

Nov. 20, 21; *Dec.* 4.

[IN THE COURT OF APPEAL.]

ATTORNEY GENERAL AND HARE *v.* METROPOLITAN RAILWAY COMPANY.

Railway— Compensation —Damage from working of Railway—Enlarging Ventilating Shaft—Damage from Construction—Railway Clauses Consolidation Act (8 & 9 *Vict. c.* 20), *s.* 16.

The defendants, a railway company, were authorized by their special Act (which incorporated the Lands Clauses and Railways Clauses Acts) to construct an underground railway. They accordingly constructed part of the railway in a tunnel, and, having purchased a piece of ground at the back of a dwelling-house, carried the tunnel through such ground and made an aperture in the ground for the purpose of ventilating the tunnel. Some years afterwards the plaintiff became lessee of the house, and during his tenancy the defendants, with a view to the better ventilation of their line, enlarged the aperture, the effect of which was that the quantity of smoke, steam, and foul air coming from the railway to the plaintiff's house was much increased, and the house materially depreciated in value:—

Held, that, whether the alteration was made by the defendants in the exercise of their rights as owners of the land or under the powers conferred by s. 16 of the Railways Clauses Act, the plaintiff, according to the principle of *Hammersmith Ry. Co.* v. *Brand* (Law Rep. 4 H. L. 171), had no right to compensation, for the alteration would cause no damage to him if the line was not used, the damage arising, not from the construction, but from the working of the railway.

ACTION upon an award of compensation to the plaintiff Hare for damage to his dwelling-house by the defendants' railway.

At the trial before Wright, J., it appeared that the defendant company was incorporated by 17 & 18 Vict. c. ccxxi., for making an underground railway from a point near the Great Western Railway Station at Paddington to Coleman Street. This Act incorporated the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. On December 28, 1860, an agreement was entered into by the Commissioners of Woods and Forests for the sale to the company of two pieces of land, A and B, at the northern end of Great Portland Street, subject as regards B to the subsisting leases of Nos. 1 and 2, Park Crescent, of the ground belonging to which two houses B formed part. This agreement contained a stipulation that the company should make compensation to the lessees and occupiers of Crown

property, situate within fifty feet from any part of the line of railway, for all damage which they might sustain by reason of the works of the company or the working of the railway. The purchase was completed by a conveyance dated December 15, 1864, which did not contain any provision for compensation to lessees and occupiers of Crown property, but contained various restrictive covenants which the Attorney General in the present action alleged the company to have broken by the proceeding in respect of which the action was brought. The leases of Nos. 1 and 2, Park Crescent, were bought by the company, and the railway was made. The house No. 3, Park Crescent, within fifty feet of the line of railway, was held by a lessee under the Crown, and such lessee in 1884 underlet the house for a term to the plaintiff Hare. The railway was carried by a tunnel through the plot B, and in this plot there was an opening for ventilation. In 1889, after the plaintiff Hare had become the underlessee of No. 3, Park Crescent, the defendants, for the purpose of providing additional light and air for their Portland Road Station, enlarged the opening in plot B to about ten times its former area. The effect of this enlargement was to cause an increased emission of noxious vapours and noise to the prejudice of the plaintiff's house.

The question of damage was by arrangement referred to arbitration without prejudice to the question whether the defendants were liable to make compensation. The arbitrators awarded that the amount of compensation payable to the plaintiff for the damage sustained by him by reason of the works, provided he was entitled to be paid any compensation, was 450*l*. The defendants disputed their liability, and this action was commenced by the Attorney General and the plaintiff to enforce payment. (1) The plaintiff contended that he was entitled to compensation under the Lands Clauses Act and Railways Clauses Consolidation Act, or to damages under the common law for nuisance.

The learned judge held that the claim under the agreement

(1) The case made by the Attorney General, as representing the Crown, was based on the stipulations contained in the agreement for sale to the company and the covenants contained in the conveyance, and is not of such a nature as to call for a report.

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and the covenants in the conveyance failed, but that the plaintiff Hare was entitled to compensation under the Lands Clauses Act and Railways Clauses Act. The defendants appealed.

1893. Nov. 20, 21. *Lawson Walton, Q.C.*, and *Maclaren*, for the defendants. There is no authority for the proposition which is involved in the decision of Wright, J. The allegation of the plaintiff is that there has been increased smoke, steam, noise, and vibration, and that the plaintiff is injured thereby. But if the injury arises from the use made by the company of their railway for the purpose for which it was constructed, then the plaintiff is not entitled to the relief which he claims. The test question therefore is, whether, if the railway were not working, there would be any injury at all. In this case it is clear that it is the use of the railway which causes the injury, if any, and that if the railway were not working there would not be any injury at all: *Hammersmith Ry. Co.* v. *Brand* (1); *London, Brighton, and South Coast Ry. Co.* v. *Truman* (2); *Caledonian Ry. Co.* v. *Walker's Trustees.* (3)

[They were stopped by the Court.]

Robson, Q.C., and *Blennerhassett*, for the respondent. What the plaintiff complains of in this case is not a consequence of the use of the defendants' railway for the purposes for which it was constructed. Here there is no necessity whatever that the defendants should discharge the smoke and steam from their line at this particular place and in this particular manner. In *Hammersmith Ry. Co.* v. *Brand* (1), what the defendants were doing was necessary for the carrying on of their railway, and the Court held that vibration was unavoidable. If vibration had been avoidable, the decision would have been the other way. *London, Brighton, and South Coast Ry. Co.* v. *Truman* (2) was not the case of a compulsory taking of land. The company had purchased by agreement. Here the defendants designed their line without any indication of this alteration in the ventilation, and for many years carried on their business and worked the line

(1) Law Rep. 4 H. L. 171. (2) 11 App. Cas. 45.
(3) 7 App. Cas. 259.

without interfering with the aperture. What the plaintiff complains of is not an increased user of the line, nor a work of necessity, nor even something in furtherance of the working of the line, or to enable the company to do its work better. It is merely an improvement effected in order to increase the comfort of the passengers carried by the defendants' railway, and those who are injured by such improvement are entitled to compensation. The improvement may be reasonable; but that is not the question. It is not necessary and inevitable: *Hammersmith Ry. Co.* v. *Brand* (1); *Fenwick* v. *East London Ry. Co.* (2) [DAVEY, L.J., referred to *Pugh* v. *Golden Valley Ry. Co.* (3)] The company are not entitled to an absolutely unrestricted user of their tunnels. They need not have run their line through tunnels at all; and they have no right so to construct their works as that when they come to be used they shall inflict an unfair amount of damage upon a particular person. So again, if a railway company constructs its line in a particular way, and then alters it in a manner not absolutely necessary for the purpose of carrying on its business, so as to cause damage, then a claim for compensation arises. It cannot be necessary to collect and concentrate a nuisance.

Lawson Walton, in reply.

Cur. adv. vult.

1893. Dec. 4. LINDLEY, L.J. This is an appeal from a judgment of Wright, J., in favour of the plaintiff Hare, for 450*l.* in respect of damages or compensation for injury done to his house by the defendants.

The facts are these. The plaintiff Hare is the lessee and occupier of No. 3, Park Crescent. His lessor is himself a lessee of the Crown, to whom the property belongs in fee. Near the plaintiff's house is a piece of land (marked B in the plan referred to in the case) which formerly belonged to the Crown, but which was sold by the Crown to the defendant company in 1860. First, there was an agreement for sale made between the Crown and the company, dated December 28, 1860; then there was a conveyance

(1) Law Rep. 4 H. L. 171. (2) Law Rep. 20 Eq. 544.
(3) 15 Ch. D. 330.

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in December, 1864, which was made after the railway company had made and opened their line. The defendant company's line passes in a tunnel under this piece of land B; and before the plaintiff became lessee of No. 3, an aperture for ventilating the tunnel was made in the ground B. In 1884 the plaintiff became lessee of No. 3. In 1889 or 1890 the defendant company considerably altered and enlarged their ventilating aperture, and the quantity of smoke, steam, and foul air coming to the plaintiff's windows has been greatly increased, and the value and comfort of his house have been considerably diminished. The object of these proceedings is to compel the defendants to compensate him for the injury thus caused to him. The parties have agreed on the amount of compensation (if any) to be paid to the plaintiff, and the question to be decided is, whether he is entitled to anything in respect of the injury above mentioned. This question resolves itself into two others, viz., first, whether any claim can be substantiated under the agreement or conveyance to which I have referred; and, secondly, whether any claim to compensation or damages can be substantiated irrespectively of those documents—viz., under the Lands Clauses and Railways Clauses Consolidation Acts, 1845, or under the common law of nuisance. Wright, J., decided the first of these questions against the plaintiff; but he decided that the plaintiff was entitled to compensation under the Acts.

I will take the second question first. The alteration of which the plaintiff complains was made in 1890 by the defendants, and may be regarded as so made by them either as owners of the property in which the alterations were made, or under the powers conferred on the defendants by the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16. As owners of the land B, the defendant company could make any use of it they pleased for the purpose of their railway so long as they did not infringe the rights of other people; and those rights are not infringed by the use of the railway which the company were authorized to construct and work unless there be negligence in such use. This is now clearly settled by *Vaughan* v. *Taff Vale Ry. Co.* (1), and by several decisions in the House of Lords, some of which

(1) 5 H. & N. 679.

will be referred to presently. (1) The alteration itself made in 1890 did not involve any trespass or cause any nuisance to the plaintiff, except by exposing him to the inconveniences caused by the use of the line. The defendants were under no statutory or other obligation not to expose the plaintiff to this inconvenience. There is no negligence in the exercise by them of their rights; consequently, the plaintiff has no cause of action in respect of the annoyance complained of.

I pass now to consider whether he has any right to compensation under the Lands Clauses or Railways Clauses Act, or both combined. The plaintiff contends that the alterations made in 1890 were not authorized by s. 16 of the Railways Clauses Consolidation Act, 1845, for reasons which I will examine presently. That section provides that, "subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works: (inter alia) "tunnels," and "They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences as they think proper; they may from time to time alter, repair, or discontinue the before-mentioned works, or any of them, and substitute others in their stead; and they may do all other acts necessary for making, maintaining, altering, or repairing, and for using the railway; provided always, that in the exercise of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers." Sect. 3 provides that "the expression 'the railway' shall mean the railway and works by the special Act authorized to be constructed." The special Act of the defendant company authorized them to construct their railway in a tunnel.

It has been decided that works made under this section must

(1) See 11 App. Cas. 45, at p. 50, per Lord Halsbury.

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be necessary for the purpose of constructing the railway or accommodation works connected therewith. "Accommodation works" are works described in s. 68, and the alteration complained of was not an accommodation work within the meaning of that section, and was not necessary for constructing any such work. Was it, then, necessary for constructing the railway? It has been decided that the expression "construction of the railway" may include works made after the line is opened (see *Sadd* v. *Maldon Ry. Co.* (1)), and is not confined to the construction of the railway in the first instance. It has also been decided that works which are only convenient to the railway company on the score of economy are not "necessary" within the meaning of the section: see *Reg.* v. *Wycombe Ry. Co.* (2); *Fenwick* v. *East London Ry. Co.* (3); *Pugh* v. *Golden Valley Ry. Co.* (4) But "necessary" cannot be restricted to absolute physical necessity. For example, it may not be absolutely necessary in order to see signals and to work the line, or to prevent asphyxiation, to ventilate even a very long tunnel; but, if it was found that by ventilating a tunnel the line could be better worked, or the health or comfort of those who had to use the tunnel would be materially improved, such ventilating shafts or other works as might be reasonably necessary for that purpose would, in my opinion, be clearly within the section: see *Sadd* v. *Maldon Ry. Co.* (1) and *Attorney General* v. *Eastern Counties Ry. Co.* (5) Now, the alteration made in 1890 was not made to save expense, but bonâ fide to improve the working of the line and to add to the comfort of all who had to work in or pass through the tunnel. It is true that the line had been constructed and worked for some years with worse ventilation. But alterations in the works as originally constructed are authorized by the section, and, if "necessary," in the sense which I have explained, are, I think, warranted by it. Upon the evidence I am of opinion that the alterations in 1890 were warranted by s. 16. Mr. Robson, in his very able argument, urged that, even if this were so, still there was no necessity to concentrate the ventilation at this particular spot, and that the

(1) 6 Ex. 143.
(2) Law Rep. 2 Q. B. 310.
(3) Law Rep. 20 Eq. 544.
(4) 15 Ch. D. 330.
(5) 10 M. & W. 263.

company had not so ventilated their tunnel as to do as little damage as could be, as required by the proviso in s. 16. This argument cannot, however, prevail. The company are the judges of the best places for ventilating their tunnels, and, provided they act bonâ fide and keep within their proper limits, they have as much right to put their ventilators in one place as in another. This is proved by the cattle traffic case, *London and Brighton Ry. Co.* v. *Truman* (1), which is conclusive on this point. As regards doing as little damage as possible, the proviso at the end of s. 16 of the Railways Clauses Act is confined to damage done in constructing the works authorized by the section, and does not apply to the use of the works when constructed. This, I think, is plain from the first and last clauses of the section. In *Reg.* v. *East and West India Docks, &c., Co.* (2) Lord Campbell pointed out that the proviso as to damage referred, not to the works to be constructed, but to the mode of constructing them. The proviso as to doing as little damage as possible must be construed consistently with the right of the company to ventilate the tunnel where it is most convenient to the company to do so, and so construed they have done as little damage as possible. The plaintiff is not entitled to say, "Ventilate your tunnel where you like so long as you do not incommode me." (3) Wright, J., did not decide against the defendants on either of the grounds to which I have above adverted. His view, if I understand it correctly, was that the injury sustained by the plaintiff might be attributed rather to the construction of the works than to the use of the line. Now, it is plain that the injury is really attributable to the combined effect of the use of the railway and the enlargement of the ventilating space. Neither without the other would injure the plaintiff, and neither without the other would give him a right to compensation. No doubt it does not follow that because one of two causes alone will not produce a given effect such effect cannot be produced by both causes acting together; but, in my opinion, the Court would be ignoring the principle of *Brand's Case* (4) and be frittering it away by reasoning too

(1) 11 App. Cas. 45.
(2) 2 E. & B. 466.
(3) See 11 App. Cas. 56, per Lord Selborne.
(4) Law Rep. 4 H. L. 171.

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subtle for business purposes if it were to hold that this case was not governed by it. The injury complained of originates in the tunnel, and the smoke, &c., causing the injury are produced by the traffic underground, or, in other words, by the use of the railway in the tunnel. But the use of the railway in the tunnel was authorized by parliament, and such inconveniences as noise, vibration, smoke, steam, dust, and foul air, unless attributable to negligence, must be put up with by the persons affected by them. No compensation can be claimed under the statutes for injury attributable to such causes. This was finally settled by the House of Lords in *Hammersmith Ry. Co.* v. *Brand* (1), which has been explained in subsequent cases, especially in *Caledonian Ry. Co.* v. *Walker's Trustees.* (2) A line has to be sharply drawn, first, between cases in which land of the person claiming compensation has been taken, and cases in which no land of his is taken; and, secondly (as regards the last class of cases), between injury occasioned by construction of works, and injury occasioned by the use of the railway. If, as in this case, no land of the person claiming is taken, compensation can be obtained for injury done by the construction of any of the works authorized, but no compensation can be obtained for injury occasioned by the use of the railway, or of such works, unless there is negligence, and there is none here. Bearing this distinction in mind, and seeing how it has been applied in the cases referred to, I am unable to adopt the decision of the learned judge on this point, and am of opinion that the case is governed by the principles established in *Brand's Case.* (1)

I have already observed that the alterations made by the defendants in 1890 were made entirely on their own land, and they do not require to invoke the aid of s. 16 of the Railways Clauses Act for the purpose of enabling them to construct the works. They have done nothing which they could not have done independently of that section, and they are protected from the consequences of what they have done by *Brand's Case* (1) and *Truman's Case* (3), without that section. But, if they do want the protection of s. 16, they have, in my opinion, complied

(1) Law Rep. 4 H. L. 171. (2) 7 App. Cas. 259; see p. 276, heads 2 and 3.
(3) 11 App. Cas. 45.

with its requirements. [The Lord Justice then proceeded to deal with the agreement of 1860 and the conveyance of 1864, and stated his reasons for coming to the same conclusions as Wright, J., on that branch of the case.]

The appeal ought, in my opinion, to be allowed, and judgment be entered for the defendants, with costs here and below.

A. L. SMITH, L.J. No one can approach this case without feeling a desire to assist the plaintiff, Mr. Hare; for it is admitted that his house has been injured to the amount of 450*l.* by what the defendant company have done and are doing.

The first and most important question is whether he is entitled to recover under the Lands and Railways Clauses Consolidation Acts compensation from the defendant company in respect of the injuries he has sustained.

Mr. Hare is lessee for a term of years of No. 3, Park Crescent, Regent's Park, and at the rear of his premises the Portland Road station upon the defendants' railway is situated. When the railway was originally constructed about the year 1861, the defendants opened up upon their own lands an air-hole of some 150 feet in extent at the rear of the plaintiff's house, and in the year 1889 they uncovered a portion of their tunnel on the Park Crescent side of their station, making thereby an air space of some 1500 feet in the place of what had theretofore existed. The result of this has been to largely increase the emission of vapours from their tunnel at the back of the plaintiff's house, which has caused the injury he has sustained. These works were executed by the defendants without negligence, and were for the purpose of giving better ventilation to their tunnel and station with a view, as they expressed it, "of ensuring additional comfort and benefit to the millions of the travelling public using their railway." The defendant company, by their special Acts, were authorized to make and maintain an underground railway, with a station in Portland Road, on the lands which they acquired. They were thereby empowered to make and maintain their works at the locus in quo either in tunnel or in open cutting, and no fetter was imposed upon them as to how as regards this matter their line was to be there constructed. No action could have

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been maintained against them for either not putting their line into tunnel or for putting it into open cutting, or part in tunnel and part in open cutting, at the place in question, for they were empowered by their special Acts to do what they thought fit as to this. The company, in my judgment, were also in like manner authorized from time to time at the place in question, as incidental to the efficient working of their line, to either open up that part which might have been originally constructed in tunnel, or to have closed up that which might have been originally constructed in open cutting, without being liable to an action for damages for so doing, unless it could be established that when so opening or closing up this part of their line they had acted negligently. The cases of *Hammersmith Ry. Co.* v. *Brand* (1) and *London, Brighton and South Coast Ry. Co.* v. *Truman* (2), both in the House of Lords, decide this.

It was expressly held in the House of Lords, in *Hammersmith Ry. Co.* v. *Brand* (1), that if by the execution of the works authorized (no land being taken) a company have injured the lands of another, compensation is recoverable by the person injured under the Lands and Railways Clauses Consolidation Acts; and it was there also held that if the injury is occasioned by reason of the user and working of the railway, it is not recoverable; or, in other words, where land is not taken compensation can only be recovered if damage arises to the land of another from the making of the railway, and not if it arises from its user.

Wright, J., when considering this question of compensation, directed himself as follows. He said: "Ought the injury to the land to be regarded as the effect of the construction or execution of the works, or as the effect of the working or user of the railway?"

This direction is good law, and the point is, Did Wright, J., accurately apply the facts of the case to this law? Do the facts shew that the plaintiff's injury arose from the making of the railway or from its use? It appears to me that the answer to the following question shews how this is. If the railway ran no trains—that is, if the railway was not worked—would the

(1) Law Rep. 4 H. L. 171. (2) 11 App. Cas. 45.

plaintiff's house have been damaged by the building of the 1500 feet of opening? My answer is, No. If this be correct, it follows that the damage to the plaintiff must arise from the user, and not from the making of the railway. Wright, J., however, held as follows: "With much doubt I have come to the conclusion that it ought not to be regarded merely as the effect of the working of the railway. It must be taken for settled law (speaking always of a person no part of whose land is taken) that no compensation can be got in respect of effects of the working of the railway which are ordinary, and which affect indifferently all adjoining lands, even though the complainant's land may happen, from its situation or otherwise, to be affected in a greater degree than others. But it seems to me that there may be works which, although not injurious in themselves unless the railway is worked, are so specially and necessarily injurious to particular land if the railway is worked at all, whether much or little, that the construction of them under powers which enable them to be used in conjunction with the working of the railway may of itself be regarded as injurious to the land, with the use of which it unquestionably interferes. There is here not a mere difference of amount of noise, smoke, and foul air, but a work specifically designed for the purpose of concentrating the vapours of an underground station, which would otherwise have diffused themselves in various directions, and of discharging the collected volume under the plaintiff's windows in such a way that the house is made materially less fit for habitation. Even if the railway were not being worked, the construction of such a work for such a purpose, with such powers, would diminish the value of the house."

It is upon this question of fact that I am unable to agree with Wright, J. No evidence was given that, if the railway were not worked, any damage would be done, nor that the construction of the enlarged opening would have diminished the value of the plaintiff's house; but, on the contrary, the evidence was that the plaintiff's house was injured by being rendered less fit for habitation by reason of the increased smoke, vapour, noise, steam, and vibration which daily escaped from the larger air space, and it was for this damage that the 450*l.* was assessed.

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It is only the working and user of the railway which brings into existence the vapours which cause the injury. Without such working and user no vapours and, consequently, no injury would exist. The building of the larger air space inflicted no damage, and could not be complained of. It is the vapours which are complained of, not the building.

I would point out that, if upon the facts of this case a claim for compensation could be supported, the smoke, vapour, noise, steam, and vibration, which daily occur at the mouth of every tunnel, would, as it appears to me, give ground for such a claim at the instance of all persons whose houses were injured thereby. This of itself shews the importance of this present, and, I think, novel, claim put forward by the plaintiff. Mr. Robson, for him, when faced with this difficulty, boldly stated that they did; but *Brand's Case* (1), in my judgment, is an express authority that they do not.

Take the case of the air space being built by A., and the fumes produced by B., and take it that the law was that A. was only to be liable for damage he might create by erecting his building. Can it be said, because he subsequently allowed B. to pass his fumes through the air space, that this was a damage caused by the erection of the building? I think not. The real truth is, that the sole injury is caused by the noxious fumes which come from the user of the line. It is true that they are let out through the building, but the building does not cause them. The damage, in my judgment, is occasioned by reason of the user of the line, and, as above pointed out, for this there is no claim for compensation.

Mr. Robson next urged that the plaintiff had a cause of action for damages at common law against the company, for he argued that the company would have to resort to the powers conferred by s. 16 of the Railways Clauses Consolidation Act, 1845, in order to entitle them to make the alteration which they did, and he asserted that, as the works were "not necessary," and that the company had not exercised *its* powers, "doing as little damage as can be," they were not authorized by that section to do what they had, and that an action was therefore maintainable.

(1) Law Rep. 4 H. L. 171.

In my judgment, this is not correct. Sect. 16 of the Act of 1845 empowers a company to execute the works therein specified, in addition to what, by its special Acts, it is empowered to execute upon its own lands, and it is a mistake to say that s. 16 cuts down the powers conferred upon a company by its special Acts. In my judgment, it adds to those powers, with the exception which is contained in the proviso of that section, viz., that in the exercise of the powers granted by that Act and the special Act the company shall do as little damage as can be.

Sect. 16 commences, "Subject to the provisions and restrictions contained in this and the special Act," clearly recognising the provisions of the special Act, and it will be seen that the sub-section in s. 16, which refers to alterations and repairs, that Mr. Robson laid stress upon, only applies to altering or repairing or discontinuing the works in that section mentioned, which are the making of temporary or permanent incline planes, the alteration of the courses of rivers, the alteration of drains through adjoining land, and the erection of houses, warehouses, stations, wharfs, engines, machinery, and other works and conveniences which the company might think proper.

In my judgment, the company in the present case were authorized to make the alteration they did upon their own lands by their special Act, and had not to resort to s. 16 of the Act of 1845 to justify what they did.

I need not, therefore, decide whether the works in question were necessary or not within the meaning of this section, though I may point out that they were not made for the sake of economy, which has been held not to constitute a necessity within this section.

Now, what is the true reading of the proviso, which enacts that "in the exercise of the powers by this or the special Act granted, the company shall do as little damage as can be"? In my judgment, it means that the company, when executing the works which by its powers it is authorized to construct, shall do as little damage as can be, and no one alleges that the alterations in this case have not in fact been properly executed. That this is the true construction is clear when the string of

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authorities commencing with *Rex* v. *Pease* (1) and ending with *London, Brighton, and South Coast Ry. Co.* v. *Truman* (2) are considered.

In my judgment, the plaintiff has no cause of action.

DAVEY, L.J. The plaintiff is the sub-lessee and occupier of No. 3, Park Crescent under a sub-lease from Beardman, the immediate lessee from the Crown.

It is not disputed that, in consequence of the railway company having made the opening in their tunnel on the piece of land marked B immediately contiguous to the plaintiff's house, he has suffered damage which would be a good cause of action at common law. The railway company, however, say that the work in question has been executed by them under their statutory powers and without negligence, and that the plaintiff's house has not been injuriously affected by the construction of the work. The plaintiff, however, claims damages under an express contract with the railway company, or, in the alternative, he says he is entitled to compensation under the provisions of the Railways Clauses Act and Lands Clauses Act. It will be convenient to take the latter contention first. Now, it has been decided by the House of Lords in *Hammersmith Ry. Co.* v. *Brand* (3) (1.) that there is no right of action for damage sustained by reason of the working of a railway without negligence under statutory powers, and (2.) that the Railway Acts give no right to compensation for any injury so sustained: see *Caledonian Ry. Co.* v. *Walker's Trustees.* (4) This decision was come to after much discussion and difference of opinion, as well amongst the judges as amongst the noble and learned lords who have expressed their opinions on the question, and I am not at all disposed to fritter away the rule by making nice or unsubstantial distinctions. It was, however, contended on the plaintiff's behalf that the work in question was not executed by the railway company under their statutory powers. It is not suggested that there is anything in the railway company's special Acts which obliges them to keep this portion of their

(1) 4 B. & Ad. 30.
(2) 11 App. Cas. 45.
(3) Law Rep. 4 H. L. 171.
(4) 7 App. Cas. 259, 276, 295.

line in tunnel; but Mr. Robson contended that the alteration was made under the powers contained in s. 16 of the Railways Clauses Act, 1845, and that under those powers the railway company can only make "necessary" alterations, and he relies on the words, "doing as little damage as can be." I think this argument unfounded. I do not feel at all clear in my own mind that it is necessary for the railway company to invoke the powers of s. 16 as an authority for making an alteration on their own land in the line of railway which, by their special Act, they are empowered to construct and maintain, the altered railway being in a state in which they might have originally constructed it. The opposite contention, if pushed to its full extent, would lead to inconvenient results. But be that as it may, I am of opinion that the company have not infringed the provisions of s. 16 in making the alteration in question. It has been made by the company, not for the purpose of saving themselves expense, but for the more convenient working of their railway, and I think that the powers of s. 16 enable a railway company to make any alterations of their works on their own land which they may consider necessary for the more convenient working of their railway, although it has been held that where they divert a stream or a road, or interfere with the property of others, they must shew that the work is strictly necessary for the construction of their railway, and not done merely to save themselves expense. Nor do the subsequent words, "In the exercise of the powers by this or the special Act granted, the company shall do as little damage as can be," in my opinion, assist the plaintiff. In the first place, "damage" there clearly means damage in construction of the works which would be the subject of compensation, and the argument that the company are bound to exercise their powers of construction so as to avoid inconvenience from the use of the works, when constructed, to individuals seems to me to be answered by the cases of *Rex* v. *Pease* (1) and *London, Brighton, and South Coast Ry. Co.* v. *Truman* (2); and see *Reg.* v. *East and West India Docks, &c., Co.* (3) It is further contended, on the part of the plaintiff, that the injury complained of in this case has been caused by

(1) 4 B. & Ad. 30. (2) 11 App. Cas. 45. (3) 2 E. & B. 466, 474.

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Davey, L.J.

construction of the work, or (in other words) that his house has been injuriously affected by the exercise of the company's powers within the meaning of the Railways Clauses Act, and consequently he is outside the decision in *Brand's Case*. (1) It is argued that the object and effect of the work in question has been to collect and concentrate upon the plaintiff's house the smoke of the locomotives, and that the injury is not the necessary consequence of the working or use of the work, but arises from its construction. And the learned judge has decided in the plaintiff's favour on this point. In my opinion, this reasoning is fallacious. The emission of smoke is the necessary consequence of the use of locomotives. The injury suffered by the plaintiff and his family is ejusdem generis with that which any other person (say) passing along the Marylebone Road might experience, though accruing to the plaintiff more frequently than to others, i.e., it is a personal injury only to the plaintiff. The argument that the plaintiff's injury is caused by the work because it would not have arisen if the work had not been constructed is answered by Lord Chelmsford's observation in *Brand's Case*. (2) What the company has done is to make an opening in their tunnel on their own land, or (in other words) to convert that portion of their line into an open cutting. And the company, keeping within their powers, were, it appears to me, as free to select this mode of ventilating their railway and station as the company were to select the particular site for their cattle pens in *Truman's Case*. (3) Applying the test suggested by Lord Chelmsford, and adopted by Mellish, L.J., in *Hopkins* v. *Great Northern Ry. Co.* (4), it is plain that the construction of the work would not have injured the plaintiff if the railway were not used, and it is the user of the railway with this opening in the tunnel, and not the construction of the opening and walls, of which the plaintiff complains. On this point, therefore, I am of opinion that the case is covered by *Brand's Case* (1), and that the appeal is successful.

[The Lord Justice then stated his reasons for agreeing with Wright, J., on the other branch of the case.]

(1) Law Rep. 4 H. L. 171.
(2) Law Rep. 4 H. L. at p. 204.
(3) 11 App. Cas. 45.
(4) 2 Q. B. D. 224.

The result will be that the judgment should be reversed, and the action dismissed, and the appellants should have the costs of the appeal and their full costs in the Court below.

Appeal allowed.

Solicitors: *J. Barrington Matthews; Horne & Birkett.*

H. C. J.

SYMONS, APPELLANT; WEDMORE, RESPONDENT.

1893 *Dec.* 12.

Licensing Acts—Renewal of Licence—Right to apply for Renewal—Application by Person other than the Licensed Person.

The holder of a licence to sell by retail beer and cider on the licensed premises applied for a renewal of his licence at the general annual licensing meeting. His application was refused, and at the adjourned general annual licensing meeting S., who had in the meantime become tenant and occupier of the premises, applied for a renewal of the licence, which had not then expired:—

Held, on the authority of *Reg.* v. *Justices of Liverpool* (11 Q. B. D. 638), that S. was a person entitled to apply for a renewal, although he was not the licensed person.

Price v. *James* ([1892] 2 Q. B. 428) discussed.

CASE stated, under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), by five justices of the peace for the city and county of Bristol.

The following material facts were stated in the case:—

At the general annual licensing meeting for Bristol, held on August 30, 1893, Thomas McGrath applied for a renewal of his licence to sell by retail beer and cider, to be consumed on the premises, at a beerhouse called the "Bird-in-hand," in Bristol. The renewal was opposed by the respondent, who was the superintendent of police of the district in which the Bird-in-hand was situated, and had given due notice of his opposition. The Bird-in-hand was a beerhouse licensed at the general annual licensing meeting for Bristol held on August 24, 1892, and had been so licensed, within the meaning of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), on and before May 1, 1869, and such licence had been renewed from time to time down to 1892. After hearing the application for

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renewal and the opposition thereto, the licensing justices refused to renew the licence, on the ground that Thomas McGrath was not qualified as by law required, not being the real resident holder and occupier of the premises in question. Subsequently, on the same day, an application was made to the licensing justices on behalf of the owners of the Bird-in-hand to adjourn the consideration of the renewal of the licence until the adjourned general annual licensing meeting to be held on September 27, 1893; but the justices refused that application. At the adjourned general annual licensing meeting John Symons, the appellant, to whom a yearly tenancy of the Bird-in-hand had been granted on September 22 by the owners thereof, and who had entered into occupation of the premises, applied by his solicitor for a renewal of the licence to him. The house had been closed to the public from August 30, 1893, and no person qualified to sell by retail intoxicating liquor therein was then in possession. The licence held by Thomas McGrath would expire on October 10, 1893. No application for a transfer of that licence was made on behalf of the appellant, his application being only for a renewal. The licensing justices refused to grant a renewal of the licence to the appellant on the ground (amongst other grounds which were not argued in the Queen's Bench Division) that the appellant was not the licensed person, and therefore not entitled to apply for a renewal.

James Paterson, for the appellant. A renewal of a licence may be granted to a person other than the licensed person: *Reg.* v. *Justices of Liverpool.* (1) That decision has been followed in *Reg.* v. *Thomas* (2) and *Baldwin* v. *Justices of Dover.* (3) In each of those cases the point raised here was involved, and it was decided that an applicant for a renewal need not be the licensed person.

J. Alderson Foote, for the respondent. The licensed person is the only person entitled to apply for a "renewal" of the licence. Sect. 1 of 9 Geo. 4, c. 61, provides for the holding of general annual licensing meetings of justices "for the purpose of granting licences to persons keeping, or being about to keep, inns,

(1) 11 Q. B. D. 638. (2) [1892] 1 Q. B. 426.
(3) [1892] 2 Q. B. 421.

alehouses, and victualling houses to sell exciseable liquors by retail to be drunk or consumed on the premises." The grant of a licence is, therefore, to the person, and the grant of a licence by way of "renewal" must be to a person to whom a licence has previously been granted. There is an obvious difference between a renewal and a grant under s. 14 of 9 Geo. 4, c. 61, which provides that in certain specified cases—such as death, bankruptcy, &c.—of which this is not one, a licence may be granted by justices at special sessions to certain specified classes of persons. The present application is for a "renewal" in the strict legal sense of the term—i.e., as applying both to the person and to the house. It is different from applications for a grant, or for a transfer, or for a continuance of a licence to sell on the premises. The Wine and Beerhouse Act, 1869, provides that retail licences are not to be granted without the production of a certificate granted under the Act, and by s. 7 every person intending to apply for a certificate shall give twenty-one days' notice in writing of his intentiou to the overseers of the parish in which the house, in respect of which the application is to be made, is situate, and to a constable acting within such parish; and, "in the case of a house not theretofore licensed," shall, within twenty-eight days of making the application, cause a like notice to be affixed to the door of such house, and on the door of the parish church; but no notice in pursuance of the section shall be requisite where the application is for the grant of a certificate by way of renewal only. Sect. 7, therefore, shews that the legislature recognised that there must be some cases in which notice was necessary where the house had been theretofore licensed; and, as applications for the grant of certificates by way of renewal are excluded from the necessity of giving notice, there is a clear legislative indication that applications for a temporary grant, or a transfer, or for the continuance of a licence to sell, are wholly distinct things from an application for a renewal. Sect. 42 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), which contains provisions as to the renewal of a licence, also implies that it is the licensed person only who can apply for a renewal, because the section begins: "Where a licensed person applies for the renewal of his licence the following

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provisions shall have effect." Sect. 48 contains regulations with respect to the forms of licences; and by sub-s. 2, "a renewal of a licence may be made by an indorsement on the licence, or by the issue of a copy of the old licence." The form of renewal prescribed, under the Act, by the Secretary of State also strongly goes to shew that the legislature contemplated that a renewal could only be granted to the licensed person. The form is: "We . . . . hereby grant unto A. B. of, &c. [here insert a licensed victualler, beerhouse keeper, &c.]." Sect. 53 provides for the continuance of the licence pending an appeal to the quarter sessions where the justices have refused to renew. It is contrary to the policy of the Licensing Acts that, where a renewal has been refused, a person coming from a distance, and perhaps unknown in the neighbourhood, may obtain a renewal without giving any notice to the police or to anyone. The cases cited for the appellant do not conflict with this contention. In *Reg.* v. *Justices of Liverpool* (1) the application was to special sessions for a licence to continue to sell under 9 Geo. 4, c. 61, s. 14. In giving judgment the judges in the Court of Appeal no doubt used the word "renewal" in describing the application, but they treated a renewal as if it were a renewal in respect of the house, whether the person applying was the person holding the licence or not; they used the term in its popular sense, and not in its strict legal sense as applying both to the person and to the house. In *Price* v. *James* (2) Lord Esher, M.R., modified his language in *Reg.* v. *Justices of Liverpool* (1), and pointed out that the correct legal term should have been "grant" rather than "renewal." The decision in *Reg.* v. *Thomas* (3) does not necessarily involve that the applicant there was entitled to a renewal. This point was not taken, though it may be conceded that the facts of the case raised it. *Baldwin* v. *Justices of Dover* (4) does not apply. That decision followed *Reg.* v. *Justices of Liverpool* (1), the application being also to special sessions under 9 Geo. 4, c. 61, s. 14.

[He also referred to *Reg.* v. *Powell.* (5)]

(1) 11 Q. B. D. 638.
(2) [1892] 2 Q. B. 428.
(3) [1892] 1 Q. B. 426.
(4) [1892] 2 Q. B. 421.
(5) [1891] 1 Q. B. 718; [1891] 2 Q. B. 693.

James Paterson, in reply. The point argued here was not raised in *Price* v. *James* (1), and the dicta of Lord Esher, M.R., which have been relied on, were obiter merely. In *Reg.* v. *Justices of Market Bosworth* (2) the facts were the same as in this case, and the Queen's Bench Division, on the authority of *Reg.* v. *Justices of Liverpool* (3), overruled the contention that none but a licensed person could apply for a renewal.

[He also referred to *Reg.* v. *Justices of Upper Osgoldcross.* (4)]

LORD COLERIDGE, C.J. It is extremely difficult to reconcile all the dicta to be found in the various cases cited which have been decided in this court and in the Court of Appeal. In my judgment some of those dicta are not reconcilable. We must, however, stand upon the authority of decided cases; and, although I cannot help feeling that there is a great deal to be said in favour of Mr. Foote's argument that "continue to sell" means one thing, and "renewing a licence" means another, and that an application for a renewal of a licence is not the same thing as an application for a continuance to sell, still I am confronted with high authority that there is no difference between them, and that really and truly they mean the same thing. The law, as I understand it, since the case of *Reg.* v. *Justices of Liverpool* (3), is this: Where there are licensed premises, and a person goes out of the occupation of them, and for a short time they cease to be used as premises in which liquor is sold, an applicant, who applies within the proper time for a renewal of a licence in respect of those premises (I will not say a renewal of the licence to himself), need not be a person who has had anything to do with the premises before; he may take advantage of the position of the original licensed holder, and he stands in the same position as the original licensed holder would have been in if he were the person who made the application. I understand that to be the effect of the decision in *Reg.* v. *Justices of Liverpool.* (3) Lord Esher, M.R., I observe, has since, in *Price* v. *James* (1), said that *Reg.* v. *Justices of Liverpool* (3) made no difference in the law, which, he said,

(1) [1892] 2 Q. B. 428.
(2) 57 L. T. (N.S.) 56.
(3) 11 Q. B. D. 638.
(4) 62 L. T. (N.S.) 112; 53 J. P. 823.

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was the same after as it was before that case was decided. I cannot bring myself to see that his dicta in *Price* v. *James* (1) are consistent with his judgment in *Reg.* v. *Justices of Liverpool* (2); but it is not for me to reconcile them, and though he says that the case of *Reg.* v. *Justices of Liverpool* (2) has been misunderstood, and that he did not mean by his dicta in that case what he seems to have meant, I can only stand upon the decision as it is expressed, and loyally follow what I understand to be the law laid down. That is what was done by A. L. Smith, L.J., and myself in *Reg.* v. *Justices of Market Bosworth* (3), which we decided, upon a state of facts undistinguishable from those in the present case, adversely to the view taken by the magistrates here, and we so decided upon the distinct authority of *Reg.* v. *Justices of Liverpool.* (2) *Reg.* v. *Justices of Market Bosworth* (3) has never been questioned; it has been treated as an authority, and I am sure we intended to adopt what we understood to be laid down in the Court of Appeal in *Reg.* v. *Justices of Liverpool.* (2) If this matter were res integra, I probably should not decide as I think I am bound to decide; but it is not res integra, and in a question of this kind it is far more important that the people interested should know what the law is one way or the other than to argue very minutely upon the words of various Acts of Parliament often very difficult to reconcile. I come, therefore, to the conclusion that in this case, as Symons was standing in the position in which McGrath, if he had been the person applying for a renewal, would have stood, and as I understand that it is not necessary, in the view of the Court of Appeal, that a licence should be renewed in the ordinary sense—namely, that a person has something given to him again which he had before—it seems to me that the magistrates here were wrong; that they ought to have followed what I understand to have been the decision of *Reg.* v. *Justices of Liverpool* (2); that, as a consequence, Symons was a person who could have applied for a renewal of the licence, and ought to have been heard when he did so apply, and that, as the magistrates did not hear him, this case must be sent back to them in order that they may hear him.

(1) [1892] 2 Q. B. 428. (2) 11 Q. B. D. 638.
(3) 57 L. T. (N.S.) 56.

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COLLINS, J. I am of the same opinion. In this case the licensed person, McGrath, did apply for a renewal of the licence. His application was refused on the ground that he had ceased to occupy the premises, and at the adjourned annual licensing meeting an application was made on behalf of Symons for a renewal of the licence which had theretofore been held by McGrath. The magistrates decided that Symons was not, under those circumstances, in a position to ask for a renewal of the licence, on the ground that he was not himself a licensed person. The question is whether, in arriving at that decision, they were right or wrong. I am of opinion, on the authority of *Reg.* v. *Justices of Liverpool* (1), and subsequent cases which have followed that decision, that they were wrong. Now, there are two cases in this court which in fact are on all-fours with the present case. One is *Reg.* v. *Thomas* (2), which is identical in point of fact, and was decided by Hawkins, J., and Wills, J. The facts being identical with those in the present case, the decision is in point and binding upon us, unless the Court of Appeal has overruled it, or unless it is inconsistent with some previous case in the Court of Appeal. It is true that the point raised before us to-day was not argued in *Reg.* v. *Thomas* (2); but it was discussed by the persons who were shewing cause against the rule, and in one sense it was necessary to their case to raise it, because their point was that the applicant had had her case fully discussed and adjudicated upon at the adjourned annual licensing meeting, and that her true remedy was not a mandamus to the magistrate to hear and determine, but an appeal to quarter sessions. In order to make that point good they contended that she was a person who could apply for a renewal at the adjourned general annual licensing meeting, and they so contended in order to shew that she had a locus standi to have her case investigated, and that it was completely investigated. The point, therefore, that the applicant was a person entitled to apply for a renewal of the licence was before the minds of the learned counsel who argued the case, and was brought to the attention of the Court, who could not have decided as they did without, consciously or unconsciously,

(1) 11 Q. B. D. 638. (2) [1892] 1 Q. B. 426.

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deciding that point, because it would have been a complete answer to the applicant's case to contend, as has been contended here, that she had no locus standi inasmuch as she was not entitled to ask for a renewal at all. The Court, in effect, held that the magistrates were bound to treat her as a person entitled to ask for a renewal, and were wrong in not so treating her, and in not stating upon which of the grounds mentioned in the Act of 1869 they refused the renewal. That decision, in my opinion, governs this case. The other case is *Reg.* v. *Justices of Market Bosworth* (1), which is an à fortiori case, because there had been a longer interval between the actual tenancy of the licensed person and the application made by the person who was not a licensed person. The case was on all-fours with the present so far as the facts went. The point there discussed was whether the application was for a new licence or for a renewal, and the Court decided that it was for a renewal, and they so decided in deference to the decision in *Reg.* v. *Justices of Liverpool.* (2) Therefore, there are two cases in this court, on all-fours with the present case, which decide the point. It is said that *Reg.* v. *Justices of Liverpool* (2) is not conclusive because of later observations of Lord Esher, M.R., in *Price* v. *James* (3) which are said to control the decision in *Reg.* v. *Justices of Liverpool.* (2) I conceive that I am bound by the decision in *Reg.* v. *Justices of Liverpool* (2), and not by any explanation which has been given by a member of the Court who decided it as to any part of his own judgment. The decision in the Liverpool case turned, as it seems to me, upon this: A Mrs. Barker was at the general annual licensing meeting precisely in the same position as the appellant, Symons, is here—that is to say, she was not a person to whom a licence had been given; but she had come into occupation of the premises in the middle of the year under an arrangement with the licensed person. She failed to make an application at the general annual licensing meeting such as is now made by Symons; and, having failed to do that, another tenant afterwards applied for a grant of a licence under s. 14 of the Licensing Act of 1828 (9 Geo. 4, c. 61), on the ground that Mrs. Barker had failed to apply at the general

(1) 57 L. T. (N.S.) 56. (2) 11 Q. B. D. 638.

(3) [1892] 2 Q. B. 428.

annual licensing meeting. Therefore, in order to decide in favour of the new applicant, it was necessary to hold that Mrs. Barker had failed to apply—in other words, it was necessary to come to the conclusion that she had a right to apply, and had not exercised it, and that was the step by which the Court of Appeal arrived at the conclusion that the then applicant was entitled to the benefit of s. 14. That was the point decided, and that was the ratio decidendi, because the Master of the Rolls begins his judgment thus: "In this case it seems to me that Mrs. Barker, on the facts stated, was a person who could have made an application for a renewal of the licence. According to the definition which has been read to us by the Solicitor General, if she had obtained a licence it would not have been a new licence, but a renewed licence for the premises. At the time of the general annual licensing meeting Mrs. Barker was the occupier of the house and premises, and from unhappy circumstances in her family she was at that time a person who was about to quit the premises. Being at that time a person in occupation of the premises, it seems to me that she was entitled to ask for a renewal of the licence. She did not apply for the renewal." Every one of those words apply to the case now under discussion. I think that the decision in *Reg.* v. *Justices of Liverpool* (1) covers this case. It is said that it has to some extent been controlled or modified by *Price* v. *James* (2); but I think the actual decision in that case does not touch it at all, because the decision in *Price* v. *James* (2) was simply this: It was there asserted by the person who was applying for a renewal that he was entitled as such to seven days' notice of objection, and whether or not he was entitled to that notice of objection depended upon whether or not he brought himself within s. 42 of the Act of 1872. When the words of s. 42 are looked at, it is clear that no person is entitled to that notice unless he is a licensed person. The only point decided in *Price* v. *James* (2) was that the person applying for a renewal, not being a licensed person, was not entitled to seven days' notice of objection. The Court did not decide that no person other than a licensed person can under any circumstances apply for a renewal, and therefore

(1) 11 Q. B. D. 638. (2) [1892] 2 Q. B. 428.

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it was not necessary to alter or modify anything that had been said in *Reg.* v. *Justices of Liverpool.* (1) In fact, in *Price* v. *James* (2) the Master of the Rolls himself says (after dealing with the real point raised under s. 42): "With regard to the second application, directly it appears that the appellant had no licence at all, it is clear that the application is not within s. 42 of the Licensing Act, 1872. The decisions in the cases of *Reg.* v. *Justices of Liverpool* (1), *Reg.* v. *Powell* (3), and *Reg.* v. *Thomas* (4) have absolutely nothing to do with the present case." If that be so, he cannot be taken in *Price* v. *James* (2) to have in any way overruled, or explained, or qualified the decision in *Reg.* v. *Justices of Liverpool.* (1) Although I quite agree with the observations which have fallen from my Lord as to what conclusion one might have come to if *Reg.* v. *Justices of Liverpool* (1), and the other cases which have followed it, were out of the way, and although I am disposed to think that, but for those cases, I might have accepted the argument which has been so ably put by counsel for the respondent, I feel that the question is really precluded in this court. I therefore entirely agree with the conclusion arrived at by my Lord, and I agree upon the authorities which he has relied upon.

Case sent back to the justices accordingly.

Solicitor for appellant: *J. H. Clifton, Bristol.*
Solicitor for respondent: *T. Holmes Gore, Bristol.*

(1) 11 Q. B. D. 638.
(2) [1892] 2 Q. B. 428.
(3) [1891] 1 Q. B. 718; [1891] 2 Q. B. 693.
(4) [1892] 1 Q. B. 426.

W. A.

THE ASSESSMENT COMMITTEE OF THE REIGATE UNION AND THE CHURCHWARDENS AND OVERSEERS OF BETCHWORTH *v.* THE SOUTH-EASTERN RAILWAY COMPANY. 1894 *Jan.* 23.

Poor-rate—Appeal—Valuation List—Approval of by Committee before expiration of Statutory Period—Union Assessment Committee Act, 1862 (25 & 26 *Vict. c.* 103), *s.* 18—*Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

The effect of s. 18 of the Union Assessment Committee Act, 1862, is to render void any valuation list which has been approved by the assessment committee before the expiration of twenty-eight days after public notice of the deposit of such list by the overseers, and also any rate made in conformity with such list, and that effect is not taken away by s. 1 of the Union Assessment Committee Amendment Act, 1864.

CASE stated by the quarter sessions of Surrey.

On February 4, 1893, a supplemental valuation list of the parish of Betchworth in the Reigate Union was duly signed and deposited by the overseers of the parish in the place in which the rate-books were kept, and on February 5, being the Sunday next following the deposit of such list, the overseers gave public notice of the deposit of such list in the manner required by law. The overseers transmitted the list to the assessment committee of the Reigate Union, who gave notice that they would hold a meeting for the hearing of objections to the list on February 28. On February 20 the respondents wrote to the assessment committee to say they would not be ready with their objections in time for the meeting on February 28, and begged the committee not to confirm any figures until they (the respondents) had appeared before them. On February 28, no formal notice of any objection having been then given, the committee approved the said valuation list. On April 25 notice of objection to the said list was given to the committee by the respondents, one of the grounds of objection stated in such notice being that the meeting of the committee at which the list was approved was informal and irregular, and that the committee had no power to approve it. On March 27 a rate was made in accordance with such list. On May 23 the assessment committee held a meeting for hearing objections to the said valuation list, when the respondents

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attended by counsel and surveyors, and their objections to the list were heard, and no alteration of the list was made. On June 1 the respondents gave to the assessment committee notice of their intention to appeal to the quarter sessions against the said rate. On the hearing of the appeal objection was taken by the respondents that by reason of the supplemental valuation list having been approved by the assessment committee before the expiration of the period of twenty-eight days from the date of the public notice of the deposit of the list mentioned in s. 18 (1) of the Union Assessment Committee Act, 1862, the respondents had been aggrieved, and that the list had not been duly approved and was not legally in force as a supplemental valuation list for the parish. The Court of quarter sessions held the objection to be well-founded, and quashed the rate, subject to a case for the opinion of the Court.

Balfour Browne, Q.C. (*Burleigh Muir*, with him), for the appellants, the assessment committee and the overseers. It may be that if s. 18 of the Union Assessment Committee Act, 1862, was still in force in all respects, and had not been amended by subsequent legislation, the committee ought to have waited the full twenty-eight days from the public notice of the deposit before approving the list, whereas they, in fact, approved it after the expiration of twenty-three days only. But that section has, so far as it fixes a limit to the time within which notice

(1) By s. 17 of the Union Assessment Committee Act, 1862: "The valuation list for each parish shall be deposited by the overseers in the place in such parish in which rate-books are deposited . . . and the overseers shall give public notice of the deposit of such list."

By s. 18: "Any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may, at any time after the deposit as aforesaid of such list and before the expiration of twenty-eight days after the notice of the deposit as aforesaid, give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof, and where the ground of any objection shall be unfairness or incorrectness in the valuation of any hereditament in respect of which any person other than the person objecting is liable to be rated, or the omission of such hereditament, also give notice in writing of such objection, and of the ground thereof, to such other person."

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of objection may be given, been repealed by s. 1 (1) of the Union Assessment Committee Amendment Act, 1864, which expressly provides that notice of objection may be given "at any time," and that the committee may amend the list, notwithstanding that they have previously approved it, and that they may so amend it even after a rate has been made; whereas under the former Act they had no such power of amendment. The quarter sessions did not appreciate this alteration in the law. Secondly, non-compliance with the terms of s. 18, even if that section remains unrepealed, does not make the valuation list a nullity, so as to render bad the rate which has been based on it. The section is not imperative, but directory only. Any person who is damnified by the approval of the list before the expiration of the statutory period would no doubt be entitled to complain; but here the respondents were not so damnified, for they, in fact, on May 23, appeared before the committee, and their objections to the list were heard. In *Reg.* v. *Ingall* (2) it was held that corresponding provisions in the Metropolis Valuation Act, 1869, as to the time within which certain acts in connection with the valuation list are to be done by the assessment committee, are directory rather than imperative.

Littler, Q.C. (*E. Boyle*, with him), for the respondents. The language of s. 18 of the Act of 1862 is imperative, and the

(1) By s. 1 of the Union Assessment Committee Amendment Act, 1864: "Before any appeal shall be heard by any special or quarter sessions against a poor-rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal and the grounds thereof to the assessment committee of such union: provided that no person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall there upon alter their then current rate accordingly."

(2) 2 Q. B. D. 199.

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valuation list, having been approved too soon, was not legally in force for the parish. That section has not been repealed by s. 1 of the Act of 1864 to the extent contended for by the appellants. The two sections do not cover the same ground. The objections, of which the party objecting to the valuation list was entitled to give notice to the committee under s. 18 of the Act of 1862, included not only objections to the overvaluation of his own tenements, but also objections to the undervaluation or omission of the tenements of third persons; and in respect of such latter class of objections provision is expressly made in that section for notice being also given to such third persons, which notice must be given within the twenty-eight days. But s. 1 of the Act of 1864 contains no provision as to notice being given to third persons; it refers only to notice to the committee. It is obvious, therefore, that that section only deals with notices of objection to the overvaluation of the objecting party, and not with notices of objection to the undervaluation of third persons; for it never could have been intended that the committee should hear and adjudicate upon objections to the valuation of third persons in the absence of such third persons.

Sect. 1 takes away the limit of time for the giving of notices of objections of the former class; but with respect to the latter class it leaves the limit of time untouched. It was upon objections of the former class alone that the respondents were heard before the committee on May 23. By the premature action of the committee in approving of the list too soon, the respondents were deprived of five days' time within which they might have given notice of objections of the latter class. (1)

Balfour Browne, Q.C., in reply. Prior to the passing of the Act of 1864, upon the hearing of an appeal against a rate, an objecting party was not in any way deprived of his right of objection by the fact that he had not objected to the valuation list before the committee. If then, s. 1 of the Act of 1864 does

(1) The respondents' notice of appeal to the quarter session was confined to objections to the overvaluation of tenements in the occupation of the respondents, and contained no reference to the undervaluation or omission of tenements in the occupation of third persons.

not apply to objections to the undervaluation of third persons, there was nothing to prevent the respondents from raising such objections on the hearing of the appeal against the rate, and consequently they were not damnified by the action of the committee in approving the list too soon. If, on the other hand, s. 1 does apply to that class of objections, and if notice of such objections may consequently be given "at any time," the contention of the respondents equally fails.

LORD COLERIDGE, C.J. I am of opinion that the quarter sessions were right, and that this rule must be discharged, upon the ground that s. 1 of the later Act does not repeal s. 18 of the earlier Act to the extent contended by the appellants, and that the approval of the valuation list by the committee before the expiration of the twenty-eight days deprived the respondents of a right of objection to the list which they would otherwise have had.

DAY, J. I am of the same opinion.

Order of sessions affirmed.

Solicitor for appellants: *F. C. Morrison.*
Solicitor for respondents: *Alfred Willis.*

J. F. C.

C. A.
1893
Dec. 19.

[IN THE COURT OF APPEAL.]

EX PARTE THE OVERSEERS OF WORKINGTON.

Justices—Jurisdiction—Disqualification by Interest—Appeals against Poor-rate —Special Sessions—16 *Geo.* 2, *c.* 18, *ss.* 1, 3—27 *&* 28 *Vict. c.* 39, *s.* 6.

Justices sitting in special sessions to hear an appeal from an assessment committee, as to an assessment to a poor-rate, are within 16 Geo. 2, c. 18, s. 1, and are not disqualified from adjudicating on the appeal by reason of their being themselves chargeable with the rate in respect of which the appeal is brought.

APPEAL from the refusal of a Divisional Court to grant a rule nisi for a prohibition.

The applicants were the overseers of the poor of the parish of Workington, who asked that a writ of prohibition might issue to the Workington District Industrial and Provident Society, Limited, and to the justices of the peace for the petty sessional division of Workington, assembled in special sessions at Workington, against proceeding with an appeal by the society against a rate for the relief of the poor of the parish of Workington. The society were rated as occupiers within the parish, and appealed to the assessment committee on the ground that the valuation of their premises was too high. The assessment committee confirmed the assessment, and the society gave notice of appeal to special sessions. The overseers appeared under protest, and objected to the jurisdiction of the justices, on the ground that all but one of the justices usually acting in and for the division of Workington, and to whom notices of special sessions had been sent, were rated and assessed to the poor-rate against which the society were appealing. Notice of the intention of the society to apply to the High Court for a writ of prohibition had been previously given, and the justices in special sessions adjourned the hearing of the appeal. The application for a writ of prohibition was made to the Divisional Court, and refused, on the authority of *Reg.* v. *Bolingbroke* (1), and the application was renewed in the Court of Appeal.

(1) [1893] 2 Q. B. 347.

1893. Dec. 4. *A. Henry*, in support of the motion. Primâ facie, personal interest in a rate would disqualify a justice from adjudicating on any matter arising out of the rate, and the question is whether that disqualification has been removed by any statute. The statute stated to have that effect is 16 Geo. 2, c. 18, s. 1, which, undoubtedly, contains very general terms enabling justices, whether of a county or a borough, to act although interested; but s. 3 of the same statute excepts from its general terms justices sitting at quarter sessions. This exception does not affect borough or city justices, as was pointed out in *Rex* v. *Justices of Essex.* (1) In this case the justices were sitting in special sessions, created by 6 & 7 Wm. 4, c. 96, which gave them nearly all the appellate powers of justices in quarter sessions, and with those powers they must be subject to the same restrictions as justices in quarter sessions, and, therefore, do not come within s. 1 of 16 Geo. 2, c. 18. That view is supported by *Reg.* v. *Recorder of Cambridge* (2), where it was held that the section only applied to justices in petty sessions, and not to them when exercising an appellate jurisdiction. The view taken by the Court in *Reg.* v. *Bolingbroke* (3) does not take account of the difference between the jurisdiction of the justices when sitting in special sessions and when sitting in petty sessions, and if that distinction is recognised, the decision cannot be supported. The enabling statute, 27 & 28 Vict. c. 39, in s. 6 expressly mentions justices in special sessions, and no meaning can be attached to the introduction of these words if the justices sitting in special sessions were not previously disqualified by interest.

Cur. adv. vult.

1893. Dec. 19. LOPES, L.J. This is an application for a writ of prohibition to justices in special sessions, to restrain them from entertaining an appeal against an assessment to a poor-rate. The ground of the application is that the justices are interested in the subject-matter of the appeal, as they are themselves chargeable to the same rate. The question turns on the statute 16 Geo. 2, c. 18, s. 1, which provides that it shall be lawful for every justice

(1) 5 M. & S. 513. (2) 8 E. & B. 637.
(3) [1893] 2 Q. B. 347.

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of the peace for any county, riding, city, liberty, franchise, borough, or town-corporate, to do within his jurisdiction any act appertaining to his office as justice of the peace, so far as the same relates to the laws concerning parochial taxes, levies, or rates, notwithstanding such justice of the peace is rated to or chargeable with the taxes, levies, or rates within any parish, township, or place affected by any such act of the justice. That is a perfectly clear enactment, enabling justices, although interested in a rate, to deal with matters arising in respect of it. It is suggested that in this respect there is a distinction between the cases of justices sitting in special sessions and justices sitting in petty sessions. I cannot see any difference between these cases. Special sessions are petty sessions held on a particular day, for a particular purpose, under the provisions of 6 & 7 Wm. 4, c. 96, s. 6. By that section, justices acting in and for every petty sessional division are to hold four special sessions in every year for hearing appeals against rates, and by s. 7 they are to act when so sitting with all the powers of justices in quarter sessions. In that statute there is nothing which limits the power of the justices in special sessions, in the event of their being subject to the rate which is appealed against. The 3rd section of the previous Act, 16 Geo. 2, c. 18, provides that nothing in the Act shall authorize any justice of the peace for any county or riding at large to act in the determination of any appeal to quarter sessions for any such county or riding from any order, matter, or thing relating to any such parish, township, or place where such justice is taxed or chargeable, anything therein contained to the contrary notwithstanding. Justices are, therefore, disqualified from acting at quarter sessions if they come within the terms of this section, though the disqualification has been to some extent mitigated by s. 6 of 27 & 28 Vict. c. 39. These disqualifications do not, however, affect s. 1 of 16 Geo. 2, c. 18; and I think it is clear that under that section the justices were at liberty to adjudicate upon the appeal which was brought before them. There is nothing in subsequent Acts which in any way limits their right to do so. This case is on all-fours with *Reg.* v. *Bolingbroke.* (1) It is true that was a case of a certiorari;

(1) [1893] 2 Q. B. 347.

but the principle is the same where, as in the present case, the application is for a prohibition. I agree, therefore, with the Divisional Court that the rule for a prohibition should not be granted, and this application must be refused.

The Master of the Rolls concurs in our judgment.

Kay, L.J., read the following judgment. This was an application for a rule nisi for a prohibition to the justices of Workington forbidding them to hear an appeal to special sessions against a rate upon the ground that they were interested persons, as being ratepayers themselves within the parish. In *Rex* v. *Justices of Essex* (1) it was held that 16 Geo. 2, c. 18, s. 1, enabled the borough sessions to hear an appeal against a poor-rate notwithstanding that the justices were so interested. This has been followed in the recent case of *Reg.* v. *Bolingbroke* (2), and it was there decided that the power of the justices to hear and determine the appeal was not impliedly taken away by s. 6 of 27 & 28 Vict. c. 39, which provides that "no justice of the peace shall be disqualified from acting in the determination of any appeal against a poor-rate at any quarter or special sessions by reason of such justice being rated, or being liable to be rated, in some other parish in the union than that for which the rate appealed against is made." It was held that this section did not apply to the jurisdiction given by s. 1 of the 16 Geo. 2, c. 18, but referred to s. 3 of that Act.

I see no reason for departing from these authorities, and am, therefore, of opinion that the rule should be refused.

Rule refused.

Solicitors: *Wood & Wootton, for J. E. Berkett, Workington.*

(1) 5 M. & S. 513.

(2) [1893] 2 Q. B. 347.

A. M.

1893
Nov. 13.

THE QUEEN *v.* LUSHINGTON. Ex Parte OTTO.

Criminal Law—Extradition—Theft—Production of alleged Stolen Property by Purchaser under subpœna duces tecum—Detention of Property for purposes of Trial in Foreign State—Extradition Act, 1870 (33 & 34 *Vict.* c. 52), s. 9—11 & 12 *Vict.* c. 44, s. 5.

Upon the hearing by a magistrate of an application for the extradition of a fugitive criminal upon a charge of theft committed in France, certain articles were produced under a subpœna duces tecum by a witness who had purchased them from the accused person in England, and were identified as part of the property stolen. The magistrate, having committed the accused to prison to await a warrant from the Secretary of State for his extradition, orally directed a constable in court to take charge of the property so produced and identified, in order that it might be produced at the trial in France. The purchaser applied under 11 & 12 Vict. c. 44, s. 5, for an order directing the magistrate to order the property to be delivered up to him:—

Held, that the magistrate was functus officio as soon as he had committed the accused to prison; that any subsequent direction as to the property, whether given or omitted, was not an act relating to the duties of his office, and that under 11 & 12 Vict. c. 44, s. 5, the Court had no jurisdiction to make the order:

Held, further, that, assuming the Court had jurisdiction to make the order, the purchaser's possessory title (if any) to the goods had been lawfully divested by reason of their passing out of his possession under the subpœna duces tecum, and that he was therefore not entitled to the relief asked.

Rule nisi, under 11 & 12 Vict. c. 44, s. 5, to a metropolitan police magistrate, calling on him to shew cause why he should not make an order for the delivery to the applicant of certain goods and jewellery produced by him on the hearing of certain proceedings for the extradition of one Emil Ebstein.

It appeared from the affidavits that a theft of jewellery and other articles had been committed at Dieppe in France, and that on September 30, 1893, Ebstein had been arrested in England on suspicion of being concerned in the robbery. Some of the jewellery stolen was discovered to be in the possession of the applicant, who had an office in the city of London, and who stated that he had bought the articles from Ebstein on September 16 for 50*l.*, and produced a receipt from Ebstein for that amount. Upon the hearing, on October 14, of the application for Ebstein's extradition, the applicant was examined as a witness,

and under a subpœna duces tecum produced the property sold to him, which was identified by the prosecutrix. Ebstein was committed by the magistrate to await a warrant for his surrender to take his trial in France upon the charge of theft, and the magistrate told a police officer in court that he had better take charge of the articles of jewellery produced by the applicant in order that they might be produced upon Ebstein's trial in France; but he made no order in writing to that effect. He further stated that the right to the property in the goods was entirely unaffected by his direction, and was fully reserved to all parties. In giving the direction the magistrate considered that he had jurisdiction to do so under s. 9 of the Extradition Act, 1870. (1) A rule nisi was obtained by the applicant to bring up the magistrate's order by certiorari, for the purpose of its being quashed, but was turned into the present rule when it was discovered that no order in writing had been drawn up.

Sir C. Russell, A.G. (*Sir J. Rigby, S.G.*, and *H. Sutton*, with him), for the magistrate, shewed cause against the rule. It is clear that, according to the universal practice in this country, the police are justified in retaining in their custody articles required for the purposes of justice in criminal cases, though there is little direct authority on the point. *Davis* v. *Roe* (June 18, 1846), (2), decides that an unwritten order by a magistrate for impounding goods in order that they may be produced in evidence is good; while in *Rex* v. *Clifford* (3) Abbott, C.J., held that if an article was produced and put in evidence at a trial it was in custodia legis, and there was power to make such an order as to its temporary impoundment as might be necessary for the purposes of justice. The magistrate had therefore jurisdiction to make the order as being necessary for the ends of justice. Upon principle it is clear that the production at the trial of the property alleged to have been stolen may be a most

(1) By 33 & 34 Vict. c. 52 (the Extradition Act, 1870), s. 9: "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England."

(2) 10 J. P. 385.

(3) 1 C. & P. 521.

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important link in the chain of evidence. It makes no difference in the present case that the order was a step in an extradition proceeding, for there can be no difficulty in stipulating before the property is produced to the French tribunal that it shall be returned to this country to be dealt with according to law.

For the purposes of this application the applicant never had more than a possessory title to the property, and such possessory title was lawfully divested when the property was produced before the magistrate under the subpœna duces tecum issued by the High Court. The present application is not one to quash the magistrate's order, but to direct him to order the property to be given up to the applicant; and there is no authority to shew that in such a case the magistrate can be ordered to direct the property to be given up to a particular person.

Edward Turner, in support of the rule. The order of the magistrate was in excess of his jurisdiction. He could have made an order for the mere detention of the property by the police for the purpose of safe custody; but an order to produce it at the trial in France was beyond the jurisdiction given him by the Extradition Act, 1870, which deals with the surrender of fugitive criminals and not of goods.

[WRIGHT, J. The magistrate has not ordered the property to be handed over to the French police. You, on the other hand, ask us to order it to be handed over to the applicant.]

The effect of the order is to send the goods out of the jurisdiction, which the magistrate can only do by virtue of specific statutory authority. Sect. 9 of the Extradition Act, 1870, under which he purported to act, relates only to the hearing of the case, and includes such powers as those of summoning witnesses, remanding and granting bail; it has no relation to anything done by the magistrate after adjudication, that is, after he has committed the accused person. All that the magistrate has to do is to determine whether a primâ facie case has been made out for extradition; he is functus officio as soon as he has made an order for committal, and all subsequent proceedings in the extradition must be the acts of the Secretary of State. The provision of article 14 of the Extradition Treaty with France, for delivering up at the time of the surrender of

the fugitive of property in his possession at the time of his arrest, has no relation to the powers of the magistrate; only the Secretary of State can act under that article. Any difficulty in obtaining evidence in this country for use at a criminal trial in a foreign country is amply provided for by s. 5 of the Extradition Act, 1873, which gives a magistrate power by order of the Secretary of State to take evidence for such purpose even in the absence of the person accused. The property, having been produced before the magistrate under a subpœna duces tecum issued by this Court, is constructively in his possession; and this Court can therefore make an order upon him for its delivery up to the applicant.

WRIGHT, J. I am of opinion that this rule must be discharged. The application was launched in the first instance as one for a certiorari to quash a supposed order of the learned magistrate directing in substance that the jewellery in question should be held for the uses of the prosecution in France of a person whom he was committing for trial under the Extradition Acts. That order was, however, never drawn up, and the form of the rule was altered, the question for us now being whether we ought to make an order on the learned magistrate requiring him to direct the delivery of the jewellery to the applicant. The jewellery was produced by the applicant when he appeared as a witness at the police court under a subpœna duces tecum, and it is not immaterial to observe that when the jewellery passed out of his hands, by virtue of the process of the Court, his possession became divested by the order of the Court. Now, what is the position of things consequent upon that?

In this country I take it that it is undoubted law that it is within the power of, and is the duty of, constables to retain for use in Court things which may be evidences of crime, and which have come into the possession of the constables without wrong on their part. I think it is also undoubted law that when articles have once been produced in Court by witnesses it is right and necessary for the Court, or the constable in whose charge they are placed (as is generally the case), to preserve and retain them, so that they may be always available for the

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purposes of justice until the trial is concluded. And there is a great deal to be said for the Attorney General's proposition, that when you find the preliminary stages of an investigation applied, not for the purpose of a trial in this country, but for the purposes of a trial abroad under the Extradition Acts, the magistrate here should have similar powers with reference to the commitment under the Extradition Act as he would have with reference to commitment for trial here, and that, in some cases at any rate, he would have power to preserve evidence for the use of the foreign tribunal. I cannot help thinking that there may be cases in which the Court here would hold a magistrate justified in handing over evidences without which the Extradition Act would be futile in its application to the particular case; but it is not necessary to decide that in this instance, and I prefer not to express any positive opinion about it.

But, however this may be, the application now made cannot succeed. In the first place, I very much doubt whether this is the kind of matter to which 11 & 12 Vict. c. 44, s. 5, applies at all. I do not think that section was intended to authorize persons having private grievances of this kind to obtain in this Court an order upon the magistrate to do something outside the ordinary course of his judicial functions. Then, again, I agree with the learned counsel for the applicant that the magistrate is functus officio, and that section only enables us to order the magistrate to perform his duty; if his duties are over, there is nothing for us to order him to perform. I think, also, that the applicant has failed to convince us that he is entitled to claim this relief, even if we had power to order it. Of course we cannot try title. I do not know what the French law on that subject may be, or what might be the ultimate view of the matter in the Courts of this country. French law may hold that the mere possession of goods which have been stolen conveys no interest at all. These goods were not bought by Otto in market overt there; it is not so alleged. It seems to me he has now no primâ facie title to them, not even a possessory title, according to the doctrine acted on in *Buckley* v. *Gross* (1), and that any possessory title which he may once have had has been lawfully divested by reason of the goods

(1) 3 B. & S. 566; 32 L. J. (Q.B.) 129.

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passing out of his possession under the direction of the Court. There is nothing to justify our granting this application until the applicant makes out title to the goods, which he cannot do on an application of this nature.

For all these reasons I think that the rule must be discharged, and I come to this conclusion with the less reluctance because it seems to me that the proper remedy of the applicant, if he has a grievance at all, is to bring an action against the persons in whose custody the goods are, and claim an injunction against their parting with them until the trial.

KENNEDY, J., concurred.

Rule discharged.

Solicitor for applicant: *Joseph Davis.*

Solicitor for magistrate: *Solicitor to the Treasury.*

W. J. B.

IN RE ROGERS. EX PARTE COLLINS.

1893

Oct. 30.

Bankruptcy—Partnership—Bankruptcy of one Partner—Bankrupt continuing Business—Personal Skill—Profits—Mixed Fund—After-acquired Property—Title of Trustee in Bankruptcy—The Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 53.

The bankrupt, at the commencement of his bankruptcy, was practising as a dental surgeon in partnership with B. He had previously mortgaged his share of the profits of the partnership, and the mortgagee had obtained the appointment of a receiver under his mortgage deed. After the commencement of his bankruptcy, the bankrupt continued to carry on the practice with B. upon the terms of the partnership deed so far as they were applicable, and his share of the profits was paid to the receiver, but was claimed by the trustee in bankruptcy:—

Held, that, although the profits of the practice arose in great part from the exercise by the bankrupt of his personal skill, yet, as from the commencement of the bankruptcy, the trustee was entitled to his share of the profits.

Ex parte Benwell (14 Q. B. D. 301) discussed.

Where the personal earnings of an undischarged bankrupt are received by him under a contract periodically by way of salary or income, and are more than sufficient for the maintenance of himself and his family, the Court has jurisdiction, under s. 53 of the Bankruptcy Act, 1883, to direct a part of such earnings to be set apart for the benefit of the creditors.

THIS was an application by the trustee in bankruptcy claiming the bankrupt's share of profits in a partnership business.

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By deed dated April 30, 1883, and made between J. Rogers of the one part, and W. A. Maggs of the other part, the said J. Rogers and W. A. Maggs agreed to carry on the practice of dental surgeons in partnership for ten years from May 1, 1883, upon the terms therein mentioned.

By deed dated October 3, 1887, and made between the said J. Rogers of the one part, and J. Ford and A. J. Rhodes of the other part, the said J. Rogers assigned (inter alia) his share and interest in the said partnership business to the said J. Ford and A. J. Rhodes by way of mortgage to secure the repayment with interest of the sum of 2000*l.* then advanced by them to him.

By deed dated March 5, 1891, and made between the said J. Rogers of the one part, and the said W. A. Maggs of the other part, the said J. Rogers and W. A. Maggs terminated the partnership subsisting between them under the deed of April 30, 1883, and agreed to become and continue partners in the practice of dental surgeons as from January 1, 1891, for the term of ten years; J. Rogers was to be entitled to two-thirds of the stock, plant, instruments, and utensils of the business, and W. A. Maggs was to be entitled to the remaining one-third; and the partners were to be entitled to the net profits of the practice in the same proportions; and the deed contained other usual clauses and stipulations.

In May, 1891, J. Ford and A. J. Rhodes commenced an action in the Chancery Division of the High Court to realize their mortgage; and on June 10, 1891, they obtained an order appointing a Mr. Langmead receiver of (amongst other things) the share and interest of J. Rogers in the said partnership business.

On September 17, 1891, a receiving order in bankruptcy was made against J. Rogers, adjudication followed, and a Mr. Collins was appointed the trustee in the bankruptcy.

Although the bankruptcy of J. Rogers determined the partnership theretofore subsisting between him and W. A. Maggs under the deed of March 5, 1891, yet the bankrupt continued to carry on in conjunction with W. A. Maggs the practice of dental surgeons upon the terms of the partnership deed so far as they were applicable thereto, and during the years 1892 and 1893 considerable sums of money, being the bankrupt's share of the

profits arising from such practice, were paid over to or collected by Mr. Langmead as the receiver in the Chancery action.

The trustee in bankruptcy now claimed, as against the mortgagees, J. Ford and A. J. Rhodes, and their receiver, to be entitled to all the profits made by the bankrupt in such last-mentioned practice since September 17, 1891 (the date of the commencement of the bankruptcy), and required an account accordingly.

Channell, Q.C., and *Muir Mackenzie*, for the trustee in bankruptcy. The bankrupt's share of the profits of this business since the receiving order was made against him is divisible amongst his creditors, and cannot be attached by the mortgagees under their mortgage deed. These profits are a mixed fund, arising partly and no doubt to a large extent from the exercise of the personal skill of the bankrupt, but also from the business carried on by him in conjunction with Mr. Maggs. The case falls within the principle of *Elliott* v. *Clayton* (1); *Emden* v. *Carte*. (2)

Reed, Q.C., and *Eve*, for the respondents. The trustee can only get these profits under s. 53 of the Bankruptcy Act, 1883; but he does not claim under that section. These profits are not salary or income, but are the personal earnings of the bankrupt obtained by the exercise of his personal skill, and do not constitute "property" available for his creditors: *Ex parte Benwell*. (3) They are also after-acquired property of the bankrupt resulting from his carrying on business bonâ fide with Mr. Maggs without interference by the trustee: *Cohen* v. *Mitchell* (4); *In re Rogers*. (5)

Channell, Q.C., in reply. *Ex parte Benwell* (3) is distinguishable. There the profits arose entirely from the exercise by the bankrupt of his personal skill. Here they are the proceeds of a business. The partnership deed speaks of stock-in-trade and utensils, and provides for assistants in the business.

Vaughan Williams, J. This is a motion which is intended by all parties to determine as far as possible what are the rights of the trustee as against the mortgagees and their receiver.

(1) 16 Q. B. 581.
(2) 17 Ch. D. 169, 769.
(3) 14 Q. B. D. 301.
(4) 25 Q. B. D. 262.
(5) 8 Mor. 236.

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Now, I cannot help thinking that in the first instance here there was a mistake by all parties as to what really was the subject-matter of dispute. Originally the dispute was as to how far, if at all, the mortgagees were entitled to rely upon the mortgage deed of 1887 as against the trustee. But whatever may have been the original dispute, it is, as I understood the arguments here, practically admitted now on all hands that the true question is, what rights the mortgagees have in respect of their dealings with the bankrupt under the deed of 1887 since the making of the receiving order. That is the real question between the parties.

Now, I propose very shortly to state the leading facts with which I have to deal. Mr. Rogers, an eminent dentist, having got into financial difficulties, borrows a sum of 2000*l.* from Messrs. Ford & Rhodes, whom I will call the respondents, meaning thereby to omit the receiver, although he in strictness also is a respondent. He borrowed that sum of money to enable him to pay his creditors their then claims; and the respondents took this mortgage deed as a security for the repayment of the 2000*l.* which they had lent, and the interest thereon. At the time when the mortgage deed was entered into, which was 1887, there was in existence a partnership between Mr. Rogers and a Mr. Maggs. That partnership deed apparently afterwards was determined, and a different one was entered into in 1891; but in substance the partnership was the same in 1887 as it was in 1891.

Then, some time shortly prior to the making of the receiving order, the mortgagees were minded to enforce their security by bringing a foreclosure action in the Chancery Division; and they did so, and they get their receiver appointed. Then comes the receiving order in bankruptcy. It is quite plain that the effect of the receiving order was to put an end to the partnership; but subsequently to the receiving order Mr. Rogers went on carrying on his business as before, and availing himself for the purpose of so carrying on his business of the assistance of Messrs. Ford & Rhodes just in the same way as he had done under the provisions of the mortgage deed in 1887. I very much doubt myself whether the mortgage deed covered the new arrangement which Mr. Rogers made subsequently to the receiving order but I do not know that I have to determine that. As I have said, as a

fact, Messrs. Ford & Rhodes and the bankrupt and his partner all continued to act just as if there had been no bankruptcy. The result of that was that the earnings of the partners were carried in the ordinary way to the partnership accounts. Messrs. Ford & Rhodes, as far as I understand, supplied some of the money which was necessary for the purpose of carrying on the business. They paid some of the creditors. Be that as it may, ultimately the net share of the proceeds to which Mr. Rogers was entitled under this new arrangement, which was based, as I have said, upon the old partnership deed, was paid from time to time to the receiver under the mortgage deed, and he proceeded to apply the moneys in the way which the mortgage deed provided just as though there had been no receiving order, and as though the business carried on by Mr. Rogers subsequently to the receiving order had been the business the subject of the old partnership deed and the subject of the mortgage deed of 1887. Now, that being the state of things, a correspondence ensued between the trustee and the respondents (whether including the receiver or not I know not), and in the course of that correspondence, as I understand, the trustee, whatever else he did, admittedly made it clear that he considered that the mortgagees and their receiver were liable to render an account to him, the trustee, of their dealings. Eventually the trustee claimed the moneys payable to Mr. Rogers under this new arrangement of partnership as being moneys which, although acquired after the receiving order and in a sense by the personal earnings of Mr. Rogers, his creditors were entitled to have treated as part of their estate; and the notice of motion in effect asks that these moneys, which either have been or in future shall be received as Mr. Rogers' share of the partnership earnings under the new arrangement, are moneys to which the trustee was entitled in the past and will be entitled in future.

Now, that being the notice of motion, I have arrived at the conclusion that in substance the trustee is right. The first thing that is said is this. It is said that the trustee cannot be entitled to the net share of the earnings of this partnership which is due to Mr. Rogers because such moneys are the personal earnings of Mr. Rogers. It is said—and rightly said—that the personal

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earnings of a bankrupt do not pass to his trustee, at all events in cases where there is no margin shewn after sufficient has been applied for the maintenance of the bankrupt. Now, that principle has only been applied to cases where the personal earnings are personal earnings strictly so-called. As I understand the cases, if what the bankrupt is earning is earned by him in his business, it is not sufficient, to bring the earnings within this rule as to personal earnings, that the business is of a character which involves a large amount of personal skill and attention by the bankrupt. It was on this ground that it was decided in the case of the surgeon-apothecary (1) and in the case of the architect (2), that the earnings did not fall within the rule. In those two cases the Court, in considering what was the nature of the earnings of the bankrupt, decided that the earnings could not be treated as mere personal earnings within this rule because, although the bankrupt would have, for the purpose of making these earnings, to use his personal skill and attention, yet the business was of a character which involved much that was independent of the personal exertions of the bankrupt. It was not like the case of a bone-setter, or of an actor, or singer, whose earnings depend really upon the personal exertion of the bankrupt, and on nothing else. In the case of the surgeon-apothecary, in his character as apothecary, he sold medicines, and in the case of the architect, in his character as an architect, he sold plans, and it was held that in both those cases the fund, arising partly from the bankrupt's personal exertions and partly from his carrying on this business, did not fall within the rule. That being so, I start in my judgment in this case by saying I do not think that the earnings of Mr. Rogers can be treated as personal earnings within the rule at all. Mr. Channell called my attention to the fact that in the partnership deed which has ceased to be in force, but which it is admitted is in a sense the basis of the present arrangement, there is mention of the stock-in-trade, and of the workshops and of assistants; and under all those circumstances, in my judgment, the earnings here are not personal earnings within the meaning of the rule. I think that these are not moneys personally earned by the bankrupt in the course of

(1) *Elliott* v. *Clayton*, 16 Q. B. 581. (2) *Emden* v. *Carte*, 17 Ch. D. 169, 768.

carrying on this partnership business, and, that being so, it seems to me that I need really trouble myself no further with the question of what would have been the result had these been personal earnings.

I wish, however, to add two observations. One is this: That even if the receipts here would fall properly within the description of personal earnings, as intended by the rule in question, yet I am by no means prepared myself to say that such personal earnings would not lose that character by being dealt with by the bankrupt himself as property for the purpose of a partnership with other people. It seems to me that that which the bankrupt earned, although it might originally have been his personal earnings, ceases to have that character, and comes to be property in the true sense of the word when it is the net share which the bankrupt is entitled to of the partnership earnings under his arrangement with his partner. It seems to me that such net share, although its origin might have been personal earnings and personal exertions becomes mere property, and that the trustee is entitled to it. I wish to say further, that a good deal has been said in the course of the argument about the 53rd section, which relates to income or salary. I do not think that I need trouble myself with that, having come to the conclusion I have done about these moneys. But, in order to prevent any misapprehension, I must say that, according to my view, the fact that moneys are properly described as personal earnings does not necessarily prevent their falling within the 53rd section. It seemed to be rather assumed in argument that because money was personal earnings it could not be within the 53rd section. I do not agree. If you happen to receive your personal earnings under a contract, so that your personal earnings are not daily earnings, but take the shape of a yearly or other periodical salary, I conceive that, subject to the rule of not depriving the bankrupt of the means of livelihood, if it be shewn that after providing fairly and liberally for the support of the bankrupt there will be a balance of salary, that that balance of salary, even though the salary is a salary for personal exertions, might be made the subject of an order under the 53rd section.

But I have to consider whether there is any other ground upon

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which it might be said that the trustee is not entitled to these moneys as against these respondents. It is said that, although there vests by virtue of the statute in the trustee all the property of the bankrupt coming to him before discharge—whether it is acquired before or after the receiving order—yet that there is a difference between property acquired before the receiving order and that acquired after it, and that that difference is expressed in the judgment in the case of *Cohen* v. *Mitchell.* (1) That there is such a difference nobody doubts. It is perfectly plain that, with regard to after-acquired property, if the trustee does not intervene and prevent the bankrupt carrying on the business, those who deal with the bankrupt have a right to say that upon the trustee's intervention he is not to insist upon his title to their detriment. That is a principle to which I entirely assent, and one which, according to my understanding, was by no means established for the first time by the judgment in *Cohen* v. *Mitchell.* (1) It is an older principle. That being the case, I have to consider whether that has any application here to prevent the trustee insisting upon his rights. Now, I wish to point out that the mortgagees here, in so far as they claim any title under the mortgage deed of 1887, clearly do not come within the rule, because they are not people who have dealt with the bankrupt by the sufferance of the trustee since the receiving order. Then it is said that the respondents have dealt with the bankrupt under the new arrangement, and that the new arrangement is since the receiving order. With regard to that, I can only say that the respondents, as mortgagees, have done nothing of the sort. They have not lent money since the receiving order, and they have acquired no security since the receiving order.

Under those circumstances, I think that I must make the order asked for.

Order accordingly.

Solicitors for trustee: *Leggatt, Rubinstein & Co.*
Solicitors for respondents: *Hyde, Tandy & Co.*

(1) 25 Q. B. D. 262.

H. L. F.

Applied. In re BRITISH FOLDING BED CO. [1948] Ch. 635

Applied. Re BRITISH FOLDING BED CO. [1948] 2 All E.R. 216.

IN RE SIMONSON. EX PARTE BALL.

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Nov. 2.

Bankruptcy—Act of Bankruptcy—Notice of Intention to suspend Payment—Payment with Notice of Act of Bankruptcy—Solicitor's Costs—Accountant's Charges for Statement of Affairs—Trustee's Title—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 41, 43, 44.

On August 15, 1892, the debtors, having consulted their solicitors, posted a circular to their creditors, stating that certain matters had placed them in "financial difficulties which makes it desirable for us to consult with our creditors as to our position. We are having our books examined and a statement prepared by" a firm of chartered accountants, "and, as soon as this is complete, we propose writing you to a meeting of our creditors." On September 5 a meeting of the creditors was held, at which the statement of affairs prepared by the accountants was submitted. On September 17 a receiving order was made against the debtors. Between August 15 and September 17 the accountants received considerable sums on behalf of the debtors, out of which they paid the solicitors 130*l.* on account of costs, and retained 100*l.* in respect of their own charges in preparing the statement of affairs:—

Held, that the circular of August 15 was an act of bankruptcy, and that both the 130*l.* and 100*l.* must be repaid to the trustee in bankruptcy, as having been payments made with notice of an act of bankruptcy.

As a general rule a trustee in bankruptcy may, in the exercise of his discretion, adopt and pay for services rendered to a bankrupt after notice of an act of bankruptcy, where such services have clearly resulted in a benefit or profit to the bankrupt's estate commensurate with the services rendered, but he must be very strict in the application of the rule.

MOTION by the trustee in bankruptcy for an order for the repayment to them by Messrs. Ford, Rhodes & Ford, accountants, and Messrs. Irvine & Hodges, solicitors, of certain moneys received by them.

On August 15, 1892, Messrs. Simonson & Co., having consulted Messrs. Irvine & Hodges, solicitors, sent out the following circular to their creditors:—

"Sir,—We regret to inform you that the recent fall in the Ivory Market and other matters have placed us in financial difficulties which makes it desirable for us to consult with our creditors as to our position.

"We are having our books examined and a statement prepared by Messrs. Ford, Rhodes & Ford, of College Hill Chambers, College Hill, Cannon Street, London, E.C., chartered accountants,

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and as soon as this is complete we propose writing you to a meeting of our creditors at a place and time of which due notice will be given to you. In the meantime it will much assist if you will kindly furnish to the accountants a statement of our account with you including any goods or other securities you may hold."

The meeting of the creditors was held on August 30, 1892, and was adjourned to September 5 following. At this adjourned meeting the statement of affairs prepared by Messrs. Ford, Rhodes & Ford was placed before the creditors, but no arrangement was come to.

On September 7, another circular (which was admittedly an act of bankruptcy) was sent out by Messrs. Simonson & Co., requesting their creditors to attend a further meeting on September 12. At this further meeting the creditors resolved on bankruptcy, and on September 17 the debtors filed their petition. The same day a receiving order was made, and adjudication followed, and a Mr. Ball was appointed the trustee in bankruptcy.

Between August 17 and September 14, 1892, the respondents, Messrs. Ford, Rhodes & Ford, received or collected on behalf of the bankrupts upwards of 494*l.* 10*s.* 11*d.*, out of which they paid or retained the following sums, viz., on September 1, 30*l.*, and on September 10, 100*l.*, both paid to the respondents Messrs. Irvine & Hodges, on account of costs; and on September 12 they retained 100*l.* 7*s.* 6*d.* in respect of their own charges of and incident to the preparation of the statement of affairs. The trustee in bankruptcy now claimed that the sums respectively received by Messrs. Irvine & Hodges and Messrs. Ford, Rhodes & Ford should be repaid to him. It was admitted that the amounts so paid and retained were for services rendered to the bankrupts prior to the filing of the petition, and that some of such services were rendered before it was ascertained whether the bankrupts were insolvent or not.

Reed, Q.C., and *Cohen*, for the trustee in bankruptcy. The circular of August 15 was an act of bankruptcy. It was equivalent to a notice that the debtors were about to suspend payment:

Crook v. *Morley*. (1) These sums are claimed in respect of services rendered after notice of an act of bankruptcy. The principle of *In re Pollitt* (2) applies. The trustee has not adopted anything that has been done in this matter, but is willing, if the Court approves, that a reasonable sum should be allowed to the respondents for what they have done.

Pyke, Q.C., for the respondents. The circular of August 15 was not an act of bankruptcy. The statement that the debtors are "in financial difficulties" does not necessarily infer that they are about to suspend payment: *Crook* v. *Morley*. (1) Their insolvency was not known until September 5, and the payment of 30*l.* is at any rate good. In the case of *In re Pollitt* (2), all expenses up to and including the costs of the deed of arrangement were allowed. But if the circular is taken to be an act of bankruptcy, the case falls within the principle of *In re Sinclair* (3); *In re Spackman*. (4) The trustee here has had the benefit of the work done by the respondents, and it is submitted that at any rate they should be allowed 100*l.* in payment of their services.

Reed, Q.C., in reply. It would be of great assistance if the Court would lay down a general rule as to what costs, charges, and expenses the trustee should allow in cases of this class.

VAUGHAN WILLIAMS, J. This motion raises the question whether the respondents, Messrs. Ford, Rhodes & Ford, and Messrs. Irvine & Hodges, who respectively are accountants and solicitors, are entitled to retain out of moneys received by them from the bankrupts the respective sums of 100*l.* and 30*l.* and 100*l.* on account of services rendered by them to the bankrupts immediately before the making of the receiving order. Now, the first point that I have to determine is, what was the date of the act of bankruptcy of which these respondents had notice. I have no doubt that I must take that date to be August 15. The case of *Crook* v. *Morley* (1) says that one must construe a circular letter of this sort in the way in which it would be understood by the commercial men who receive it. It is a circular issued to creditors, and I cannot doubt but that it must have

(1) [1891] A. C. 316.
(2) [1893] 1 Q. B. 455.
(3) 15 Q. B. D. 616.
(4) 24 Q. B. D. 728.

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conveyed to every creditor who received it the intention of the debtors to suspend payment. In point of fact, it would have been a very dishonest thing for these debtors to have made payments after issuing that circular. The circular so much means that the debtors hope that the creditors will hold their hands, since they cannot pay everybody, that it would have been, in my opinion, dishonest and improper for the debtors, after issuing it, to make any payments. For that reason, I think that the case comes within the rule laid down by Lord Selborne in *Crook* v. *Morley*. (1) I am quite aware that in that case the words of the circular were, "Being unable to meet my engagements"; but it seems to me that the words of the letter of August 15 mean the same thing: "We regret to inform you that the recent fall in the Ivory Market and other matters have placed us in financial difficulties which makes it desirable for us to consult with our creditors as to our position." I think that any creditor receiving that would understand that these gentlemen were unable to meet their engagements, just as if that thing had been expressed in the identical words of the circular in *Crook* v. *Morley*. (1)

Now, that being so, the next question is whether these gentlemen are entitled to retain these moneys on account of their charges. I think they are clearly not entitled to retain them. What was decided in *In re Sinclair* (2) was that when a man comes with ready money in his hand and asks for legal assistance with regard to his financial affairs, or his financial position, the lawyer, or it may be the accountant, is not bound to ask the person coming with ready money where it comes from. But, as pointed out by Cave, J., in *In re Spackman* (3), there is nothing in the decision in *In re Sinclair* (2) which enables a solicitor or an accountant to take from the debtor a charge upon the debtor's property to secure payment for the services to be rendered, because in such a case the very fact informs the solicitor or accountant, as the case may be, that the money which he is looking to for payment is the money of the bankrupt, and, potentially, the money of his creditors; and it seems to me that just the same consideration arises with regard to moneys which the accountant or solicitor may be collecting for the debtors

(1) [1891] A. C. 316. (2) 15 Q. B. D. 616.
(3) 24 Q. B. D 728.

which were due to them in the course of their trade. Under those circumstances, it seems to me that this case is clearly outside *In re Sinclair* (1), and falls within the rule laid down by Lord Esher in *In re Pollitt.* (2) Now having said that, it seems to me that the only possible conclusion I can come to upon this motion is to decide in favour of the trustee with costs.

But I am asked to say whether the trustee can properly make any allowance to either the accountant or solicitor in respect of the work which they did. What I understand to be the rule as to that matter is this: If the trustee in the exercise of his discretion thinks that the creditors have derived profit from the work which has been done at the direction of the debtor, the trustee may adopt those services and pay for them. But although that is to my mind the rule, I by no means think that it is a rule which would justify the trustee in at all liberally or freely spending the money of the creditors in paying the expenses of the meetings of creditors which the debtor or debtors may have thought fit to call before their bankruptcy. On the contrary, I think that the trustee ought to be very slow indeed to adopt any such services. One knows quite well that, in the hope of avoiding bankruptcy, debtors in difficulties will catch at a straw and always hope that something may avoid that disagreeable result. They always will call their creditors together, not from any sense really that it is the best thing to do for the creditors, but because they hope somehow or another, if there is a meeting of creditors, they may avoid bankruptcy. That being so, I should say that, generally speaking, a trustee ought to decline to adopt the services of the solicitor or accountant with regard to these meetings which debtors, in the expectation of a probable bankruptcy, call of their creditors. But I am unwilling to say that there may not be a case in which the trustee may properly adopt a portion of the services. It is said here that the accountants prepared a statement of affairs which was very useful to the creditors at the time of this meeting, and enabled them to determine with full information what was the best course for the creditors to adopt. That particular item of charge is a charge for a service which I can quite understand the trustee

(1) 15 Q. B. D. 616. (2) [1893] 1 Q. B. 455.

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might say was a very useful service, and he might pay for it. The solicitor may, for ought I know, necessarily have been employed to get that statement prepared; but I should have said primâ facie that the employment of a solicitor for that purpose was quite unnecessary, and I should have thought that the debtors might have given their instructions directly to the accountant. At the present moment, not having the bill before me, I cannot say whether there are any services of the solicitor which the trustee may properly adopt and pay for as having been useful to the creditors. He must exercise his own discretion, and, when he has done so, then, if any one feels aggrieved by the exercise of his discretion, the matter may be brought before the Court; but the rule that I lay down, and intend that the trustee should act upon, is that he should be very strict in this matter of adopting services of this sort and paying for them, and he must go through the items of the bill of costs, and only pay for such items as he is clearly satisfied have been incurred in such a way as that a benefit to the extent of the charge has resulted to the creditors.

Solicitors for trustee: *Druces & Attlee.*
Solicitors for respondents: *Irvine & Hodges.*

H. L. F.

1893
Oct. 31;
Nov. 11.

IN RE FOX & JACOBS. EX PARTE THE DISCOUNT BANKING COMPANY OF ENGLAND AND WALES.

Bankruptcy—Secured Creditor—Interest above 5 per Cent.—Assessed Value of Security allocated in Discharge of Interest—Proof for Balance of Principal—The Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 23—*The Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., rr.* 9, 11.

The 23rd section of the Bankruptcy Act, 1890—which provides that where a debt has been proved upon a debtor's estate with interest, such interest shall for the purposes of dividend be calculated at a rate not exceeding 5 per cent. per annum—does not prevent a secured creditor, who has realized or assessed the value of his security, from allocating such value in discharge of the interest, even although such interest is at a higher rate than 5 per cent. per annum, and proving for the principal or balance of principal due to him.

APPEAL from decision of trustee in bankruptcy rejecting in part the proof of the appellants.

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On June 28, 1892, the bankrupts borrowed 300*l.* of the Discount Banking Company of England and Wales, and agreed to pay a lump sum of 80*l.* for interest; such sum of 380*l.* to be repaid by monthly instalments of 16*l.*, and if any instalment was not paid when it became due then the whole amount then remaining unpaid should at once become due and payable. At the same time the bankrupts deposited with the company the lease of certain premises as collateral security for the 380*l.* The bankrupts paid but one instalment of 16*l.*, and on September 15, 1892, the company commenced an action to recover the sum of 364*l.*, being the balance of the amount then due; and on October 8, 1892, they obtained judgment for 364*l.* and 7*l.* costs.

In the meantime, on September 28, 1892, a receiving order was made against the bankrupts, and the official receiver eventually became the trustee in their bankruptcy.

On December 2, 1882, the company lodged a proof for 371*l.*, being the amount due to them on their judgment for debt and costs, and assessed the value of the lease at 150*l.*

In April, 1893, the official receiver disclaimed the lease, and the company took a vesting order.

In May, 1893, the official receiver gave notice to the company that he admitted their proof for dividend at 140*l.* 10*s.* only, which sum he arrived at in this way: "Every payment of 16*l.* must be taken to be in respect of principal and interest pro rata. Of the 16*l.*, therefore, 12*l.* may be taken as principal. Then 300*l.* less 12*l.* = 288*l.* Five per cent. for two months on 288*l.* = 2*l.* 8*s.*, say 2*l.* 10*s.* 288*l.* + 2*l.* 10*s.* = 290*l.* 10*s.* Deduct 150*l.*, the assessed value of the lease, which leaves 140*l.* 10*s.*"

The company claimed the right to allocate the 150*l.* in discharge of the agreed interest, and the surplus in part satisfaction of the balance of the principal remaining due, and to prove for 214*l.*, which represented the 364*l.* less the 150*l.*

F. C. Willis, for the company. A secured creditor is entitled to allocate the assessed value of his security in whatever way he pleases: *Ex parte Hunter* (1); *Ex parte Glyn* (2); The Bankruptcy Act, 1883, Sched. II., rr. 9, 11. The company, therefore,

(1) 6 Ves. 94. (2) 1 M. D. & D. 25.

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were entitled to allocate the 150*l.* to the interest due to them, although the rate was above 5 per cent., and to prove for the balance of principal due to them.

Muir Mackenzie, for the trustee. The question turns on the construction of s. 23 of the Bankruptcy Act, 1890. The case falls within the words of the section. If the contention of the other side is correct, a money-lender who has advanced money at a high rate of interest, and who also holds security, can always evade the statute.

F. C. Willis, in reply.

Cur. adv. vult.

Nov. 11. VAUGHAN WILLIAMS, J. This is an application to vary the decision of the trustee, whereby he allowed the proof of the applicants, for the purpose of dividend, at 140*l.* 10*s.*, being 138*l.*, the amount remaining due in respect of principal after deducting 150*l.*, and 2*l.* 10*s.* interest, calculated at the rate of 5 per cent. per annum, and no more. The facts are these: The applicants have proved for the full amount of their debt of 371*l.*, and have assessed the value of certain security claimed by them at 150*l.* The trustee claims to deduct for the purposes of dividend from the 371*l.* the excess of the agreed interest over interest at 5 per cent., the interest allowed by s. 23 of the Act of 1890, and then to deduct from the amount so arrived at the 150*l.*, the assessed value of the security, and thus arrives at the 140*l.* 10*s.*, the amount at which he admits the proof for dividend. The applicants say that for the purpose of dividend they make no claim for interest, which has been satisfied by the allocation of a sufficient part of the assessed value of the security, and claim to prove for the whole unpaid balance of the principal, less only the balance of the assessed value of the security after satisfying the claim for interest. I think that the applicants are right, and the trustee is wrong.

The question turns on the construction of s. 23 of the Act of 1890, which is as follows: "Where a debt has been proved upon a debtor's estate under the principal Act, and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be

calculated at a rate not exceeding five per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full." It is said that the debt proved includes interest, and that by the very terms of the section such interest must, for the purposes of dividend, be calculated at the rate not exceeding 5 per cent. In my judgment, these words of the section can only be applied to that part of the debt proved in respect of which a creditor is entitled to receive a dividend, and rule 9 of Schedule II. provides that "if a secured creditor realizes his security he may prove for the balance due to him after deducting the net amount realized." It seems to me that s. 23 is only applicable to the balance in respect of which dividend is payable. The words of the section, in my opinion, admit of this construction. It may be that the words also admit of the construction sought to be put upon them by the trustee; but it seems to me that the latter construction would work grave injustice. It cannot be intended to put a secured creditor in a different position according as he realizes his security or assesses its value. It seems plain that the amount on which he is to receive dividend ought to be the same in either case. Now, rule 11 of Schedule II. provides, "That if a secured creditor does not either realize or surrender his security he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed." This seems to make it plain that if the balance remaining, after deducting the net amount realized, includes no interest, s. 23 can have no application; and it seems to me to follow that, if the balance remaining after deducting the assessed value includes no interest, s. 23 ought to have no application. It is to be observed that under the Bankruptcy Act, 1869, and rule 99 of the Rules of 1870, a secured creditor who proved and assessed the value of his security was deemed to be a creditor only in respect of the balance due to him after deducting the assessed value of such security, and I do not think that if the legislature had meant materially to alter the position of secured

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creditors it would have left that intention to appear by the mere difference between the wording of rule 11 of Schedule II. and rule 99 of the Act of 1870. I have only to add that the general right of a secured creditor to allocate his security to that part of his debt in respect to which he had no right of proof was not disputed by the counsel for the trustee. *Ex parte Hunter* (1) and *Ex parte Glyn* (2) are authorities under former statutes for this proposition.

Solicitors for trustee: *Steadman & Van Praagh.*
Solicitors for creditor: *Adams & Adams.*

H. L. F.

1893
Nov. 14.

IN RE ABBOTT.

Bankruptcy—Practice—Consolidation of Petitions—Members of same Partnership—Dissolution of Partnership—Separate Adjudications against late Partners—The Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 112.

Where a partnership has been dissolved, and afterwards separate receiving orders are made against the late partners, and there are joint assets and liabilities still in existence, the Court has jurisdiction to consolidate the proceedings under the separate receiving orders.

SPECIAL case stated for the opinion of the judge of the High Court under s. 97 of the Bankruptcy Act, 1883.

In September, 1892, A. and F. Abbott, who had previously carried on business in co-partnership for many years, dissolved partnership by mutual consent, and sold the partnership assets by public auction.

On October 29, 1892, A. and F. Abbott filed separate bankruptcy petitions in the county court, and separate receiving orders were made against them.

A. Abbott had no separate assets and no separate liabilities, but there was a debit against his separate estate of 13*l.* 2*s.* 6*d.* for the costs of his petition.

F. Abbott had separate assets of small value, and his separate liabilities amounted to 288*l.* 15*s.* 5*d.* There were joint assets and joint liabilities of the late partnership still in existence.

(1) 6 Ves. 94. (2) 1 M. D. & D. 25.

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The official receiver applied to the county court that the proceedings under the two receiving orders might be consolidated. The county court judge was of opinion that it would be beneficial to all parties interested that the consolidation order should be made, but doubted whether, as there was no partnership subsisting at the date of the two petitions, there was jurisdiction to make the order, and directed a special case to be stated, the question for the High Court being whether there was jurisdiction to make the order.

Muir Mackenzie, in support of the application. The question turns partly upon s. 112 of the Bankruptcy Act, 1883, which provides that "where a receiving order has been made on a bankruptcy petition against or by one member of a partnership, any other bankruptcy petition against or by a member of the same partnership shall be filed in or transferred to the Court in which the first-mentioned petition is in course of prosecution, and unless the Court otherwise directs the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the Court may give such directions for consolidating the proceedings under the petitions as it thinks just." The difficulty is that the section seems to refer to an existing partnership, but here the partnership had been dissolved. In the case of *In re Pearcey* (1), which was an application under s. 98 of the Bankruptcy Law Consolidation Act, 1849, the facts were similar to the present case, but the application to consolidate was opposed, and the Court declined to make the order; and in *In re Trott* (2), which was a similar application under s. 88 of the Bankruptcy Act, 1861, but a case in which there were no joint assets, the Court again declined to make the order, but intimated that if there had been joint assets the order would have been made.

[VAUGHAN WILLIAMS, J., referred to Robson on Bankruptcy, 5th ed. p. 748, and cases there cited.]

It is submitted that the Court in the exercise of its discretion has jurisdiction to make the order.

(1) 7 L. T. (N.S.) 758. (2) 7 L. T. (N.S.) 699.

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VAUGHAN WILLIAMS, J. My impression is that the power to consolidate separate proceedings was not the invention of the statute originally, but that it existed long before it had any statutory form. It seems clear that in practice, at all events, consolidation was not limited to cases where the partnership continued down to the period of the respective adjudications. Then I have to construe the 112th section of the present Act and to say whether the word "partnership" in that section means a partnership continuing down to the time of the receiving orders being made, the proceedings under which are sought to be consolidated. I think I ought not to place too strained a construction upon it, but that I ought to exercise the power of consolidation whenever it seems to the interests of everybody concerned in the administration of the estates that I should do so. Therefore, I think that here there ought to be consolidation of the proceedings, but only of the proceedings.

Solicitor: *W. Murton.*

H. L. F.

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Oct. 31; *Nov.* 11.

IN RE BARGEN. EX PARTE HASLUCK.

Bill of Sale—Bankruptcy—Second Bill of Sale in Substitution of First—Payment of Principal and Interest by Instalments—Form—Validity—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *Sched.*

In January, 1892, a bill of sale was executed to secure the repayment of 200*l.* with interest as therein mentioned, and the grantor covenanted to pay the principal and interest by weekly payments of 2*l.* 6*s.* 2*d.* until the whole should be paid, the first payment to be made on January 25.

In December, 1892, the grantor was adjudicated bankrupt.

In January, 1893, the grantor gave the grantee, who did not know of the bankruptcy, another bill of sale over the goods assigned by the first bill of sale in substitution for such bill of sale:—

Held, first, that under the circumstances the second bill of sale did not operate as a surrender or cancellation of the first bill of sale; and, secondly, that the first bill of sale was not void under the Bills of Sale Act, 1882, by reason of interest as well as principal being included in the instalments, or of the instalments being spread over an indefinite period.

Goldstrom v. *Tallerman* (Law Rep. 18 Q. B. D. 1) discussed.

APPLICATION by trustee in bankruptcy for an order to set aside two bills of sale.

It appeared that on January 13, 1892, G. Bargen (the bank-

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rupt) executed a bill of sale of certain chattels in favour of the London and Westminster Loan and Discount Company, Limited, to secure the repayment of "200*l.* and interest thereon at the rate of 6*d.* in the pound per month"; and the bankrupt covenanted with the company to pay them "the principal sum aforesaid together with the interest then due by weekly payments of 2*l.* 6*s.* 2*d.*, the first of such payments to be made on January 25 instant, and the like payment to be made on the Monday of each and every succeeding week until the whole be paid."

In November, 1892, a receiving order was made against G. Bargen, and in the following December he was adjudicated bankrupt, and L. Hasluck was appointed trustee.

On the 30th of January, 1893, the bankrupt executed another bill of sale of the same chattels to the company to secure the repayment of 143*l.* 12*s.* 6*d.* and interest at 6*d.* in the pound per month, with a like covenant for payment by weekly instalments of 1*l.* 5*s.*

This second bill of sale was given in substitution for the first bill of sale in consequence of the bankrupt having informed the company that he could not keep up the instalments under the first bill of sale, and was accepted by them in total ignorance of the bankruptcy proceedings. The trustee in bankruptcy claimed that both bills of sale were void as against him.

Muir Mackenzie, and *T. E. Crispe*, for the trustee. The second bill of sale operated as a cancellation of the first bill of sale. The intention of the parties must be considered by the Court: *Smale* v. *Burr* (1); *Ramsden* v. *Lupton*. (2) If the second bill of sale turns out to be bad, the company cannot revert to the first bill of sale, which is no longer a subsisting security. The second bill of sale is bad, and creates no charge over the property, because it was executed by the bankrupt after his bankruptcy. If the first bill of sale is taken to be a subsisting security, it is void under the Bills of Sale Act, 1882, because it is not in accordance with the form in the schedule to the Act. The weekly payments of 2*l.* 6*s.* 2*d.* will not work out into any definite sum, and are

(1) Law Rep. 8 C. P. 64. (2) Law Rep. 9 Q. B. 17.

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spread over an indefinite period: *Goldstrom* v. *Tallerman* (1); *Edwards* v. *Marston.* (2)

Cluer, for the company. Under the circumstances, the second bill of sale did not operate as a cancellation of the first bill of sale: *Gummer* v. *Adams* (3); *Cooper* v. *Zeffert.* (4) The first bill of sale is a subsisting security, and is not rendered void by the fact that the weekly instalments include interest as well as principal: *In re Cleaver* (5); *Simmons* v. *Woodward.* (6) The form in the schedule to the Act does not require a definite number of instalments to be specified.

M. Mackenzie, in reply.

Cur. adv. vult.

Nov. 11. VAUGHAN WILLIAMS, J. In this case I am asked to declare that a bill of sale dated January 13, 1892, and given by the bankrupt to the respondent, is void as against the trustee in bankruptcy. The first ground upon which the trustee relies is that this bill of sale was followed by another given by the bankrupt on January 30, 1893, and it is said that the giving of the later bill of sale operated as a surrender of the first bill of sale, and it is further said that the later bill of sale is void because it was given after the receiving order and adjudication against the bankrupt. Now, it is admitted that the respondents were not aware of the receiving order or adjudication, and, in my judgment, it follows that the bill of sale which the bankrupt gave and the respondents took in substitution for the former bill, cannot have operated as a surrender or cancellation of the former bill. The bankrupt had no interest in or power over the bill which he had given. The equity of redemption was in his trustee. The bankrupt had no interest or power over the goods which were the subject of the new bill of sale. The whole transaction was based on a mistake in fact, not law, and the position of the respondents, in my opinion, remains unaltered by the giving of the later bill of sale. The intention of the respondents was dependent upon the fact of a new contract being made, and

(1) 18 Q. B. D. 1.
(2) [1891] 1 Q. B. 225.
(3) 13 L. J. (N.S.) (Ex.) 40.
(4) 32 W. R. 402.
(5) 18 Q. B. D. 489.
(6) [1892] A. C. 100.

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a new security being in fact given. The next ground of objection was based upon the decision in *Goldstrom* v. *Tallerman* (1), but I do not think that the decision supports the objection. In that case the bill of sale provided for the payment of twelve monthly instalments of £41 13*s.* 4*d.*, together with the interest then due, and the bill of sale went on to provide that in default of payment of any instalment the mortgagor would pay interest thereon. It was contended that the word "instalment" properly construed included not only the 41*l.* 13*s.* 4*d.*, the aliquot part of the principal, but also the interest, and that the proviso therefore involved payment of interest upon interest. The Divisional Court held that this was the construction of the word "instalment" in that bill of sale, and avoided the bill as reserving interest upon interest. But the Court of Appeal took a different view, and held that the word "instalment" was properly applicable to the aliquot part of the principal only. This point does not seem to arise in the present case, because the present bill of sale does not contain a default clause. Had it done so, it probably would have been open to the objection sought to be urged against the bill in *Goldstrom* v. *Tallerman* (1), for it is obvious that the instalment reserved in the present bill of sale is not an aliquot part of the principal sum of 200*l.* and may be an aliquot part of the principal sum of 200*l.* plus the varying sums for the diminishing interest as the proper proportion of each weekly instalment is appropriated to the payment off of the principal. I cannot understand what objection there can be to this. The statutory form contemplates that the principal sum together with the interest then due may be paid by equal instalments covering principal and interest, and the fact that it was decided in *Goldstrom* v. *Tallerman* (1) that the instalment may be limited to principal does not shew that the instalment may not cover principal and interest. I asked the learned counsel whether he in fact contended that the sum of 2*l.* 6*s.* 2*d.* was not an aliquot part of the principal plus the amounts of the varying interest, and he said he did not. It is quite true that the bill of sale does not on the face of it say how many instalments will be necessary to satisfy the amounts secured; but the statutory form

(1) 18 Q. B. D. 1.

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Vaughan Williams, J.

of bill of sale seems open to the same objection. It may be that it involves a difficult calculation to arrive at the number of instalments; but the answer is that the statutory form seems itself to necessitate such a calculation. The motion must be dismissed with costs.

Solicitor for trustee: *M. S. Rubenstein.*

Solicitor for respondent: *J. C. Jackman.*

H. L. F.

1893

Oct. 28.

NORBURN *v.* NORBURN.

Practice—Receiver—Equitable Execution—Executor of Judgment Creditor—"Parties entitled to Execution"—Order XLII., *rr.* 8, 23.

The appointment of a receiver of the property or interest of a judgment debtor is not "execution" within the meaning of Order XLII., rr. 8, 23. The executors of a deceased judgment creditor are, therefore, not entitled to obtain an order for the appointment of a receiver of the judgment debtor's property, or an injunction against his dealing with it.

APPEAL from chambers.

The plaintiff, Mary Norburn, had recovered judgment for 1400*l.* against the defendant, her son, in May, 1886. In August, 1886, the plaintiff died, having by her will appointed the applicants, William and Mary Elizabeth Norburn, her executor and executrix. The defendant, who had not satisfied the judgment, became entitled in 1893 to certain interests under the wills of two deceased relatives. In October, 1893, the plaintiff's executors, who had taken no steps to revive the action, took out a summons entitled in the original action (1), asking for the appointment of a receiver of the defendant's interests under the wills and for an injunction restraining him from dealing with those interests. The summons came on for hearing ex parte before Kennedy, J., who refused the application for the appointment of a receiver, but gave the applicants leave to issue a fresh summons to be served upon the defendant, and granted an interim injunction until the hearing of the fresh summons. On October 24, the new summons came on for hearing before Bruce, J., who held

(1) The summons was entitled "Mary Norburn, widow, since deceased, plaintiff *v.* Henry Norburn defendant."

that the executors were not entitled to an order for the appointment of a receiver, but continued the interim injunction until the hearing of the appeal of the executors against the refusal of the order. The defendant now appealed against so much of the order as continued the interim injunction.

Bankes, for the defendant. If there was no right to the appointment of a receiver, there was no jurisdiction to grant or continue this injunction. The executors should have revived the action by obtaining under Order XVII., r. 4 (1), an order to carry on the proceedings, so as to entitle themselves to ask for an injunction; not having done so, they could only enforce the judgment by bringing themselves within the operation of Order XLII., r. 23 (2), which allows execution to issue in certain cases, including the death of one of the parties, by leave. The appointment of a receiver is, however, not a mode of execution as defined by Order XLII., r. 8; and the executors cannot obtain a receivership by an application under Order XLII., r. 23.

Lacey Smith, for the applicants. There was jurisdiction to make the order. By s. 25, sub-s. 8, of the Judicature Act, 1873, an injunction may be granted, or a receiver appointed, by an interlocutory order of the Court, in all cases in which it shall appear to the Court to be just or convenient that such order

(1) By Order XVII., r. 4: "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability . . . . it becomes necessary or desirable that any person not already a party should be made a party . . . ., an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court or a judge, upon an allegation of such change, or transmission of interest or liability. . . ."

(2) By Order XLII., r. 8, the term "writ of execution," includes writs of fieri facias, capias, elegit, sequestration and attachment, and all subsequent writs that may issue for giving effect thereto, and the term "issuing execution against any party" means the issuing of any such process against his person or property, as under the preceding rules of the Order are applicable to the case.

By Order XLII., r. 23: "Where . . . any change has taken place by death or otherwise in the parties entitled or liable to execution . . . . the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect. . . ."

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NORBURN v. NORBURN.

should be made. This is eminently a case in which it is just and convenient to make the order. If the executors were in a position to obtain an order for the appointment of a receiver, they were parties in whose favour an injunction could be granted.

[WILLS, J. It may be that on the large words of s. 25, sub-s. 8, if there is a right to have a receiver appointed, the power to grant an injunction is ancillary to such right; but if the judge refuses to appoint a receiver, how can he grant an injunction? The question must be whether a receivership is execution.]

[*Bankes* cited *In re Shephard* (1), as shewing that the appointment of a receiver is not a form of execution.]

WILLS, J. I think that this appeal must be allowed. It may be desirable that the rules should be altered, as to which I express no opinion, but as they stand this is a very clear case. It is quite clear that upon the death of the plaintiff before judgment a personal action abates. If the plaintiff's death takes place after judgment, it is the judgment, not the action, which has to be considered. The old method of dealing with such a case was for the executors to issue a scire facias or a writ of revivor to enforce the judgment in their favour. For this cumbrous process has been substituted the method provided by Order XLII., r. 23. There is no other provision in the orders entitling them to be heard. Now, rule 23 gives executors a right to ask for leave to issue execution upon a judgment obtained by their testator; in this case the applicants have not done this, but have asked for a receivership. It is not even as if Order XLII., r. 23, stood by itself and apart from the other rules of this order; it must be read in conjunction with rule 8, in which "issuing execution" is defined as the issuing of any such process as under the preceding rules of the order are applicable to the case. Now, the preceding rules of the order deal with various matters and methods of enforcing judgments, but they are wholly silent as to a receivership. I entirely concur, therefore, with the decisions of my brothers Bruce and Kennedy at chambers that they had no jurisdiction to make an order for the appointment of a receiver. As to the injunction, it may be (I go no further) that an injunction

(1) 43 Ch. D. 131.

will be granted in cases where it is ancillary to some other substantive remedy; but there can be no jurisdiction to grant it if there is no person entitled to be heard as an applicant. Unless it can be shewn that the application for a receiver was an application for leave to issue execution, the applicants had no locus standi. This objection goes as deep as any objection possibly can; it cuts away the right of the applicants to be heard. I have no doubt, therefore, that the refusal to appoint a receiver was right, and that the order for the injunction cannot be sustained.

GRANTHAM, J. I am of the same opinion.

Appeal allowed.

Solicitors for applicants: *Alex. Pope, for H. R. Jones, Wandsworth.*

Solicitors for defendant: *Warriner & Kinch.*

W. J. B.

MAY *v.* CHIDLEY AND ANOTHER.

1893 *Nov.* 10.

Practice—Writ specially Indorsed—Application for Leave to enter final Judgment—Affidavit verifying Cause of Action, Sufficiency of—Action on Cheque.

Upon an application under Order XIV., r. 1, for leave to enter final judgment upon a writ specially indorsed with a claim for the amount of a dishonoured cheque, the affidavit verifying the cause of action need not contain an allegation that notice of dishonour has been given to the drawer.

APPEAL of the defendants from an order of Bruce, J., at chambers, giving leave to the plaintiff to sign final judgment under Order XIV.

The action was brought upon a dishonoured cheque. The writ was specially indorsed under Order XIV., the indorsement containing an allegation that notice of dishonour had been given to the drawer. (1) The affidavit verifying the cause of action made on behalf of the plaintiff contained no allegation that notice of dishonour had been given, and was in these terms:

(1) This allegation was omitted in the original indorsement, but the indorsement was by leave amended in that respect.

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"(1.) The defendants are justly and truly indebted to the plaintiff in the sum of 28*l.* 1*s.* 6*d.* for the amount of a dishonoured cheque, dated August 21, 1893, for bank charges, and were so indebted at the commencement of this action. The particulars of the said claim appear by the indorsement on the writ of summons in this action. (2.) I verily believe that there is no defence to this action." The learned judge at chambers thought that the affidavit sufficiently verified the cause of action, and, there being no defence on the merits, gave the plaintiff leave to enter final judgment, thereby reversing the order of a master, who had given the defendants leave to defend.

T. Willes Chitty, for the defendants. The affidavit is insufficient; it does not, as required by Order XIV., r. 1, verify the cause of action, which must mean the whole cause of action. Where a writ is indorsed with a claim on a dishonoured cheque, the indorsement, in order to be a special indorsement within Order III., r. 6, must aver that notice of dishonour has been given to the drawer: *Fruhauf* v. *Grosvenor*. (1) The statement of claim, so specially indorsed, is the cause of action, and notice of dishonour is part of the cause of action, and must be verified in the affidavit filed under Order XIV., r. 1. The affidavit itself says that the particulars of the claim appear by the indorsement on the writ, and it ought to verify those particulars, of which notice of dishonour is one.

Bankes, for the plaintiff. It is not necessary that the affidavit should verify every part of the cause of action; non-payment, for example, is part of the cause of action, but it is never alleged in an affidavit under Order XIV. The allegation of indebtedness is sufficient, for the defendants would not be indebted if no notice of dishonour had been given. A substantial verification of the cause of action is all that is required.

WILLS, J. I think that this appeal must be dismissed. My only difficulty arises from the reference in the affidavit to the particulars of the claim indorsed on the writ. But on looking at the forms of special indorsement given in Appendix C to the

(1) 61 L. J. (Q.B.) 717.

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Rules of the Supreme Court, it is apparent that the statement of claim is something which stands by itself, and is distinct from the particulars which follow it; and I think, therefore, that this reference to the particulars does not cut down the effect of the allegations in the first paragraph of the affidavit. A defendant in an action on a dishonoured cheque is not indebted unless notice of dishonour has been given. The function of the affidavit is to verify the cause of action, and it does not matter that it does not state or verify all the particulars given in the statement of claim or special indorsement. The statement of claim or special indorsement would, it is true, be defective if the allegation of notice of dishonour were omitted, but the verification of the cause of action in the affidavit may be made in general terms.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Royle & Co., for Tyndall & Co., Birmingham.*

Solicitors for defendant: *Warriner & Kinch.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.

1894

Jan. 16.

THE QUEEN *v.* THE JUSTICES OF THE COUNTY OF LONDON AND THE LONDON COUNTY COUNCIL.

Practice—Prohibition—Rule Absolute without Pleadings—Costs—Supreme Court of Judicature Act, 1890 (53 & 54 *Vict. c.* 44), *ss.* 4, 5.

The right to grant prohibition not being a jurisdiction belonging exclusively to the Crown side of the Queen's Bench Division, the High Court, in making a rule absolute for a prohibition without pleadings, may make an order for costs.

QUESTION as to the jurisdiction of the Queen's Bench Division to give costs on an order for a prohibition, without pleadings, reserved on the argument of the case. (See report, [1893] 2 Q. B. 476.)

A rule was obtained on behalf of the St. George's Union Assessment Committee for a prohibition to the justices of the

C. A. 1894

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county of London and the London County Council from proceeding with certain appeals by the London County Council against the valuation list of the parish of St. George, Hanover Square.

The Divisional Court made the rule absolute with costs. The London County Council appealed, and the appeal was dismissed; but the question whether the Divisional Court had jurisdiction to make the order for costs was reserved.

1893. Nov. 20. *Horace Avory*, for the London County Council. The Divisional Court had no jurisdiction to award costs. The case of *London County Council* v. *Churchwardens of West Ham* (1) establishes that the Judicature Acts have not altered the practice in proceedings on the Crown side of the Queen's Bench Division. That was a special case stated by the justices, and brought up by order instead of as formerly by certiorari; but the same principle is applicable to prohibition. *Ex parte Overseers of Everton* (2) shews that before the Judicature Acts the statute 1 Wm. 4, c. 21, s. 1, did not entitle the applicant for a prohibition to his costs where there were no pleadings.

The Divisional Court followed *Wallace* v. *Allen* (3); but it is submitted that that decision cannot be supported, since neither at common law nor by statute was there jurisdiction to make an order for costs. Moving a rule with costs cannot affect the jurisdiction of the Court to give them; but this case was not moved with costs, so that the distinction that appears to have been taken in *Wallace* v. *Allen* (3) does not arise.

[He referred to *Reg.* v. *Parlby*. (4)]

Danckwerts, contrà. A person against whom a rule for a prohibition is granted is in the position of a wrongdoer who has made an unfounded application. Before the Judicature Acts such rules were constantly made absolute with costs: *Robinson* v. *Emanuel* (5); *Quartly* v. *Timmins* (6); *Worthington* v. *Jeffries* (7); *Wallace* v. *Allen*. (3) Since those Acts the same practice has prevailed: *Evans* v. *Wills* (8); *Warwick Canal Co.* v. *Birmingham*

(1) [1892] 2 Q. B. 173.
(2) Law Rep. 6 C. P. 245.
(3) Law Rep. 10 C. P. 607.
(4) W. N. (1889) 190.
(5) Law Rep. 9 C. P. 414.
(6) Law Rep. 9 C. P. 416.
(7) Law Rep. 10 C. P. 379.
(8) 1 C. P. D. 229.

Canal Co. (1); *Reg.* v. *Midland Ry. Co.* (2); and *Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.* (3) The jurisdiction to grant prohibition was not confined to the Queen's Bench, but was exercised by the Court of Chancery as well as by the Common Pleas and Exchequer. In the Court of Chancery the giving of costs was discretionary and not conformable to the rule of law: *Jones* v. *Coxeter* (4); *Corporation of Burford* v. *Lenthall* (5) —this case shewing further the effect of a sufficiency of precedents on the question of the authority of the Court to give costs; and *Andrews* v. *Barnes.* (6) The words of 1 Wm. 4, c. 21, s. 1, giving costs to the successful party in proceedings in prohibition, are consistent with the view that where there were no pleadings there was a discretion as to costs. In *Ex parte Overseers of Everton* (7) the argument turned on whether there was jurisdiction to give costs under the statute, and not on whether they were in the discretion of the Court; and the same remark applies to *Rex* v. *Kealing.* (8) The Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), repealed 1 Wm. 4, c. 21, but by s. 5 reserved jurisdiction acquired by virtue of the repealed enactments, and also gave power by s. 6 to make rules as to such jurisdiction, and this has been carried out by rule 300 of the Crown Office Rules, 1886, which applies Order LXV. of the Rules of the Supreme Court, 1883 (Costs), to all civil proceedings on the Crown side. Further, Order LXVIII. expressly applies Order LXV. to prohibition; so that the costs are in the discretion of the Court or judge just as in other proceedings in the Supreme Court. If it is said that no jurisdiction existed, and that Order LXV. was not intended to confer any new power—*In re Mills' Estate* (9)—that is met by the provisions of s. 5 of the Supreme Court of Judicature Act, 1890. (10)

(1) 5 Ex. D. 1.
(2) 19 Q. B. D. 540.
(3) 17 Ch. D. 493.
(4) 2 Atk. 400.
(5) 2 Atk. 551.
(6) 39 Ch. D. 133.
(7) Law Rep. 6 C. P. 245.
(8) 1 Dowl. 440.
(9) 34 Ch. D. 24.

(10) 53 & 54 Vict. c. 44, s. 5: "Subject to the Supreme Court of Judicature Acts, and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates

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Horace Avory, in reply. It was decided in *Free* v. *Burgoyne* (1), that by the common law there were no costs in prohibition, and that unless they are given by statute none can be awarded. That was a case of pleading; but where it is a question of making a rule absolute without pleadings the case is an à fortiori one. This application is made in the Queen's Bench Division, and being so made it is on the Crown side and is within the restriction imposed by s. 4 of the Supreme Court of Judicature Act, 1890, on s. 5 of the same Act. (2) It is no argument in favour of the jurisdiction to give costs in such a case to say that the applicant might have gone to another Court. Order LXVIII., r. 2, expressly includes prohibition among civil proceedings on the Crown side of the Queen's Bench Division, and the rule is senseless unless this is such a proceeding. The citing of cases in which the Courts have made orders for costs is of no value unless it is shewn that the matter was raised and discussed, and the silence on this point of nearly all the reports cited negatives this. [He also referred to *Garnett* v. *Bradley*. (3)]

Cur. adv. vult.

1894. Jan. 16. LOPES, L.J. The Master of the Rolls is not able to be present to give judgment; but he agrees with the judgments that are about to be read.

A writ of prohibition on motion had been granted by the Divisional Court against the assessment sessions of the county of London. The prohibition was granted with costs. There was an appeal to this Court, and this Court affirmed the decision of the Divisional Court. The question whether the last-named Court had power to give costs was argued subsequently, and this Court took time to consider its judgment.

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and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

(1) 6 B. & C. 538; and in House of Lords, 1 Dow. & Cl. 115.

(2) 53 & 54 Vict. c. 44, s. 4: "Nothing in this Act shall alter the practice in any criminal cause or matter, or in bankruptcy, or in proceedings on the Crown side of the Queen's Bench Division."

(3) 3 App. Cas. 944.

It is contended that the Divisional Court had no power to give costs, though if the prohibition had been refused it is admitted and it is clear that there was jurisdiction to refuse it with costs.

But has the Divisional Court power to give costs when a prohibition without pleadings is granted?

It is contended that the practice as to prohibition is governed by s. 4 of the Judicature Act, 1890, which says, "that nothing in the Act shall alter the practice in any criminal cause or matter or in bankruptcy, or in the proceedings on the Crown side of the Queen's Bench Division."

I will assume that if this were a case belonging to the Crown side of the Queen's Bench Division it would be covered by this section, and costs could not be given; and I will assume that if it were a case of certiorari s. 4 would regulate the power to award costs, because certiorari belongs to the Crown side of the Queen's Bench Division.

But prohibition was not a jurisdiction belonging any more to the Queen's Bench than to the other Courts. It might be applied for and granted either in the Queen's Bench, or the Exchequer, or the Common Pleas. They all had concurrent jurisdiction and power to inhibit inferior tribunals. Prohibition, too, could be and was granted by the Court of Chancery.

Many cases were cited both before and after the passing of the Judicature Acts where prohibitions were granted without pleadings both by the Common Law Courts and the Court of Chancery and costs given. That such a practice to grant costs had existed for many years and had been followed before and after the Judicature Acts was beyond controversy. It was objected, however, to these cases that the point of want of jurisdiction was not taken; but the point, in my opinion, was not taken because it was felt that it could not be successfully maintained.

Other grounds were suggested by Mr. Danckwerts in his able argument in support of the decision of the Divisional Court with regard to the costs, which I think it unnecessary to refer to. I am satisfied to rest my judgment upon the ground that the Courts of Chancery, Queen's Bench, Exchequer and Common

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Pleas had formerly jurisdiction to grant prohibition with costs when there were no pleadings, and that the same jurisdiction is now vested in the High Court, and is not touched by s. 4 of the Supreme Court of Judicature Act, 1890.

Such a conclusion is consonant with authority and also with justice, for it is difficult to understand on what principle a litigant who successfully impeaches the jurisdiction of a Court into which his adversary has improperly dragged him is to be deprived of the costs of a proceeding which the conduct of his adversary has rendered imperatively necessary.

I am of opinion, therefore, that the Divisional Court had jurisdiction to give costs.

KAY, L.J. The London County Council in this case commenced proceedings before the assessment sessions to dispute the totals of certain valuations for taxation and rating purposes. This Court of Appeal decided that they had no locus standi to raise the question which they tried to raise of the improper valuation of certain hereditaments, and granted a prohibition against them with costs. Costs had been given against them by the Divisional Court from which this appeal was brought. A question is now raised whether that Court had jurisdiction to order them to pay costs on granting the prohibition against them. If the prohibition had been refused, it is not disputed that the applicant, even though a stranger to the litigation sought to be prohibited, might be ordered to pay costs: *Lloyd* v. *Jones*. (1)

Sect. 5 of the Judicature Act, 1890, would enable any judge of the High Court to give costs in such a case as this. But it is argued that its effect is controlled by s. 4, which provides that nothing in the Act shall alter the practice in any criminal matter, or in bankruptcy, or in the proceedings on the Crown side of the Queen's Bench Division. That was decided to be the effect of s. 4 in *London County Council* v. *Churchwardens, &c., of West Ham* (2), which was an appeal from the Queen's Bench Division on a special case stated by quarter sessions on an appeal against a poor-rate. This, it was held, was a proceeding on the

(1) 6 C. B. 81. (2) [1892] 2 Q. B. 173.

Crown side of the Queen's Bench Division, in which, before the Judicature Act, it was said there was no power to give costs; and, therefore, by s. 4 of the Act of 1890, that disability was continued. Lord Blackburn, in *Garnett* v. *Bradley* (1), said, "Costs in Courts of Common Law were not by common law at all; they were entirely and absolutely creatures of statute," and it was held in the *West Ham Case* (2) already referred to, that there was no statute which enabled the Court to give costs in a proceeding on the Crown side of the Queen's Bench Division. See also *London County Council* v. *Assessment Committee of Woolwich Union.* (3) The *West Ham Case* (2), however, was heard as a case of certiorari; this is a case of prohibition. Prohibition, it is argued, is not a jurisdiction peculiar to the Crown side of the Queen's Bench Division. It was granted by the Court of Chancery and by the Courts of Exchequer and Common Pleas. Those Courts had power to give costs when the prohibition was granted against the person whose proceeding in the inferior Court was prohibited. Now, by the Judicature Act, 1873, s. 16, the High Court has all the jurisdiction capable of being exercised by any of those Courts.

This argument seems very cogent, and, if accepted, it removes, at least in the case of prohibition, what seems to be an anomaly in practice as to costs. If a litigant commences proceedings in the wrong Court which has no jurisdiction to entertain them, the proper course for his opponent to take is to apply to a superior Court for a prohibition. It seems unreasonable that the defendant obtaining a prohibition should be unable to recover against the wrongdoer the cost of the proceeding.

Several cases were referred to in which, where a prohibition was granted without pleadings, costs were given. In the Common Pleas, *Robinson* v. *Emanuel* (4); *Quartly* v. *Timmins* (5); *Worthington* v. *Jeffries.* (6) These were cases before the Judicature Acts. Also, since these Acts the same practice was observed in *Evans* v. *Wills* (7); *Warwick Canal Co.* v. *Birmingham Canal*

(1) 3 App. Cas. 944, at p. 962.
(2) [1892] 2 Q. B. 173.
(3) [1893] 1 Q. B. 210, at p. 227.
(4) Law Rep. 9 C. P. 414.
(5) Law Rep. 9 C. P. 416.
(6) Law Rep. 10 C. P. 379.
(7) 1 C. P. D. 229.

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Co. (1); *Reg.* v. *Midland Ry. Co.* (2); *Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.* (3)

These instances shew what the practice has been in the Courts of Chancery, Common Pleas, and Exchequer, and the only observation that can be made upon them is that there does not seem to have been any argument upon the question of costs; but that may have been because the practice in those Courts was indisputable.

The Court of Chancery has always exercised a large discretionary jurisdiction in the matter of costs, as is shewn by the cases of *Jones* v. *Coxeter* (4); *Andrews* v. *Barnes.* (5)

If we adopt this argument, the appeal of the London County Council against these costs fails. But it is proper to notice other parts of the very careful and ingenious argument of Mr. Danckwerts.

The first point made was as to the effect of 1 Wm. 4, c. 21. It is suggested that the true meaning of that statute was to make the costs follow the event, where there were pleadings in prohibition, and a judgment in the action so conducted, without any mention of costs in the judgment; and to leave other cases to the discretion of the Court, to give or refuse costs at its pleasure. For this construction there is some authority in the cases of *Wallace* v. *Allen.* (6)

Another argument was, that whatever might be the effect of 1 Wm. 4, c. 21, that statute, as well as the previous Act, 8 & 9 Wm. 3, c. 11, s. 3, were repealed by 46 & 47 Vict. c. 49, ss. 3 and 4, and s. 6 (*c.*) of that Act gave power to deal with costs in prohibition by Rules of Court. Subsequently the Crown Office Rules, 1886, were made. Rule 300 provides that Order LXV. of the Rules of the Supreme Court, 1883 (Costs) shall, as far as it is applicable, apply to all civil proceedings on the Crown side. Rules 81 and 82 relate to applications for a writ of prohibition on the Crown side, which are to be by motion to a Divisional Court in criminal cases, and to a judge at chambers in civil cases.

Then it is pointed out that Order LXVIII. of the General

(1) 5 Ex. D. 1.
(2) 19 Q. B. D. 540.
(3) 17 Ch. D. 493.
(4) 2 Atk. 400.
(5) 39 Ch. D. 133.
(6) Law Rep. 10 C. P. 607.

Orders makes Order LXV. applicable to the Crown side of the Queen's Bench. But it was decided in *In re Mills' Estate* (1) that this order was not intended to confer jurisdiction as to costs which did not exist before. For this reason the Judicature Act, 1890, was passed, s. 5 of which embodies the terms of Order LXV., r. 1, and no doubt enlarges the jurisdiction. But s. 4 restricts the operation by excepting the Crown side of the Queen's Bench Division.

I have come to the conclusion that the High Court in cases of prohibition, which is not a jurisdiction peculiar to the Crown side of the Queen's Bench, has all the jurisdiction as to costs formerly exercised by the Courts of Chancery, Common Pleas, and Exchequer; and that as these last-mentioned Courts seem to have had and exercised jurisdiction to give costs against the defendant when granting a prohibition, the High Court now has a like jurisdiction. It is not, therefore, necessary to consider the decision in *Wallace* v. *Allen* (2), from which I should not dissent without careful examination.

Appeal against order for costs dismissed.

Solicitors for the assessment committee: *Caprons, Dalton, Hitchins, & Brabant.*

Solicitor for the county council: *W. A. Blaxland.*

(1) 34 Ch. D. 24.

(2) Law Rep. 10 C. P. 607.

A. M.

1893
Nov. 9, 11.

IN RE R. G. THOMPSON. EX PARTE BAYLIS.

Solicitor—Bill of Costs—Taxation—Agreement in Writing—Signature of—Payment—Attorneys and Solicitors Act, 1870 (33 & 34 *Vict. c.* 28), *s.* 4—6 & 7 *Vict. c.* 73, *s.* 41.

The solicitor for the plaintiff settled an action, in which the plaintiff had obtained judgment, but the defendants had appealed, on the terms of the payment by the defendants of 210*l.* damages and 120*l.* for his costs. He explained the terms of the settlement to the plaintiff, and paid the plaintiff 210*l.* The plaintiff then signed a document in the following terms: "Received from T" (the solicitor) "the sum of 210*l.*, being the amount of damages received on my behalf from the defendants, and, having regard to the fact that he has settled with them for a sum less than that to which he would have been entitled for costs, if they had been unsuccessful, I hereby agree to allow the sum paid by me to him on account of costs as an equivalent for the abatement he has made to the defendants." The sum thus paid amounted to 55*l.* 16*s.* The solicitor afterwards delivered to the plaintiff a cash account containing on the credit side 330*l.* and 55*l.* 16*s.*, in all 385*l.* 16*s.*, on the debit side 210*l.*, and "amount of agreed costs" 175*l.* 16*s.*, i.e. 120*l.* and 55*l.* 16*s.*, in all 385*l.* 16*s.*:—

Held, that the plaintiff was not entitled to an order for taxation, for the document constituted an agreement in writing between solicitor and client within the meaning of s. 4 of the Attorneys and Solicitors Act, 1870, and the transaction amounted to payment between solicitor and client within the meaning of s. 41 of 6 & 7 Vict. c. 73.

Dictum in *In re Lewis, Ex parte Munro* (1 Q. B. D. 724) disapproved.

APPEAL by a solicitor against an order for the taxation of a bill of costs referred to the Court by Lawrance, J.

The order was made in July, 1892, in an action tried in December, 1890, in which the plaintiff, for whom the solicitor acted, recovered judgment for 210*l.* damages and costs. It appeared from the report of a district registrar that in January, 1891, the defendants, who had appealed, offered to settle the case by paying 270*l.* for damages and costs. The solicitor told his client that, if she agreed to these terms, she would receive 150*l.*, would have to pay certain witnesses, and would not receive back a sum of 55*l.* 16*s.* which she had paid to him on account of costs. In February, 1891, the defendant agreed to pay the damages in full and 120*l.* for the solicitor's costs, or 330*l.* The solicitor explained this arrangement to his client, and paid her 210*l.* She then signed the following document:—

"Received from R. G. Thompson the sum of 210*l.*, being the

amount of damages received on my behalf from the defendants; and, having regard to the fact that he has settled with them for a sum less than that to which he would have been entitled for costs, if they had been unsuccessful, I hereby agree to allow the sum paid by me to him on account of costs as an equivalent for the abatement he has made to the defendants.

"Jane Baylis."

The solicitor subsequently delivered to his client a cash account, containing on the credit side 330*l.* and 55*l.* 16*s.*, in all 385*l.* 16*s.*; on the debit side 210*l.* and "amount of agreed costs" 175*l.* 16*s.*, i.e. 120*l.* and 55*l.* 16*s.*, in all 385*l.* 16*s.*

Channell, Q.C., and *C. M. Lush*, for the solicitor. The client is not entitled to an order for taxation. The document is an agreement in writing within s. 4 of the Attorneys and Solicitors Act, 1870. (1) It is said in the judgment of Lord Coleridge, C.J., in *In re Lewis, Ex parte Munro* (2), that such an agreement requires to be signed by both the solicitor and the client; but this is a mere dictum. The facts found by the registrar also shew payment as between solicitor and client within s. 41 of 6 & 7 Vict. c. 73: *Hitchcock* v. *Stretton* (3); *Ex parte Hemming*. (4)

Mattinson, for the client. The client is entitled to an order for taxation. The agreement cannot be enforced. The passage

(1) By the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4, "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements . . .: Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a Court having power to enforce the agreement."

By 6 & 7 Vict. c. 73, s. 41, "The payment of any such bill as aforesaid shall in no case preclude the Court or judge, to whom application shall be made, from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such Court or judge, appear to require the same, upon such terms and conditions and subject to such directions as to such Court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment."

(2) 1 Q. B. D. 724.

(3) [1892] 2 Ch. 343.

(4) 28 L. T. (O.S.) 144.

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in the judgment in *In re Lewis, Ex parte Munro* (1), is referred to without dissent by Fry, J., in *In re Raven, Ex parte Pitt* (2), by Kay, J., in *In re Russell, Son & Scott* (3), by Cave, J., in *In re West, King, & Adams, Ex parte Clough* (4), and by North, J., in *In re Frape, Ex parte Perrett.* (5) The agreement has also not been examined and allowed by an officer of the Court as required by the Act of 1870. The facts found shew a retainer by the solicitor of money which he had in hand, not a payment to him by the client, as required by the earlier Act: *In re Stogdon* (6); *In re Street* (7); *In re West, King, & Adams, Ex parte Clough.* (4)

POLLOCK, B. I should be sorry to have to make an order for taxation in this case. The parties have been heard before the registrar, and his report shews that all the honesty is on the side of the solicitor. It is said, on the authority of the dictum in *In re Lewis, Ex parte Munro* (1), that the document signed by this gentleman's client is not an agreement in writing within s. 4 of the Attorneys and Solicitors Act, 1870, because it is not signed also by him. In that case the agreement was signed by the solicitor only, and the reason given for requiring the client to sign also is that "otherwise it would always be possible for a solicitor to place a document, signed by himself only, and containing terms favourable to him, before a client, and then to contend that the client was bound by it." This observation has plainly no bearing on the present case. It is said that the dictum has been assented to in subsequent decisions; but I do not find this to be the case. It has been quoted, not unnaturally, in judgments in which the effect of the language of the statute has not been carefully considered; but in *Bewley* v. *Atkinson* (8), Thesiger, L.J., points out that the expressions used are wider than was necessary for the decision, and it is not supported by *In re Raven, Ex parte Pitt* (2), in which Fry, J., merely held that a letter written by a client to a solicitor did not shew "accession in writing." I think that the document satisfies

(1) 1 Q. B. D. 724.
(2) 45 L. T. (N.S.) 742.
(3) 30 Ch. D. 114.
(4) [1892] 2 Q. B. 102.
(5) [1893] 2 Ch. 284.
(6) 56 L. J. (Ch.) 420.
(7) Law Rep. 10 Eq. 165.
(8) Law Rep. 13 Ch. 283, at p. 299.

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the statute, and that the client is not now entitled to have the agreement examined by the officer of the court.

I am also of opinion that the transaction described by the registrar amounted to payment within s. 41 of 6 & 7 Vict. c. 73. It was not a mere retainer by the solicitor out of money deposited with him as in *In re West, King, & Adams, Ex parte Clough* (1); it was payment followed by the delivery of a bill of costs to which the payment could be referred. Therefore, according to *Hitchcock* v. *Stretton* (2), *Ex parte Hemming* (3) applies. What would be payment between a tradesman and his customer is payment between a solicitor and his client.

CHARLES, J. I am of the same opinion as to both matters. As to s. 4 of the Attorneys and Solicitors Act, 1870, the dictum in *In re Lewis, Ex parte Munro* (4), as was pointed out by Thesiger, L.J., in *Bewley* v. *Atkinson* (5), was not necessary to the decision, the ground of which was that the agreement relied on by the solicitor had not been signed by the client; and *In re Raven, Ex parte Pitt* (6), is not an authority in its favour. All that Fry, J., there held was that the document relied on, the terms of which are not reported, did not shew "accession in writing." As regards s. 41 of 6 & 7 Vict. c. 73, *In re Street* (7) and *In re Stogdon* (8) were cited; but those cases were considered in *Hitchcock* v. *Stretton* (2), and the result of that decision, and of *In re Frape, Ex parte Perrett* (9), taken in connection with *Ex parte Hemming* (3), is that, where a bill of costs is delivered after payment, if the payment can be referred to the bill of costs, an order for taxation will not be made. Here the payment can clearly be referred to the subsequently delivered bill of costs. The order must, therefore, be discharged.

Order discharged.

Solicitors: *Bell, Brodrick, & Gray; Johnson & Dowding.*

(1) [1892] 2 Q. B. 102.
(2) [1892] 2 Ch. 343.
(3) 28 L. T. (O.S.) 144.
(4) 1 Q. B. D. 724.
(5) Law Rep. 13 Ch. 283, at p. 299.
(6) 45 L. T. (N.S.) 742.
(7) Law Rep. 10 Eq. 165.
(8) 56 L. J. (Ch.) 420.
(9) [1893] 2 Ch. 284.

H. D. W.

C. A.

1894

Jan. 17.

[IN THE COURT OF APPEAL.]

SYNGE *v.* SYNGE.

Husband and Wife—Contract in Consideration of Marriage—Promise to leave House to intended Wife for Life—Promiser putting it out of his Power to perform Promise—Immediate Right of Action—Claim of Damages—Measure of Damages—Power of Court to make Declaration of Right—Power to decree Conveyance after Death of Promiser.

The defendant before, and as an inducement to, his marriage with the plaintiff promised in writing, as part of the terms of the marriage, to leave a house and land to her for her life. The plaintiff consented to the terms proposed, and the marriage took place; but the defendant subsequently conveyed the property by deed to a third person. In an action to recover damages for breach of contract:—

Held, that as the defendant had put it out of his power to perform the contract there had been a breach, in respect of which the plaintiff had an immediate right of action to recover damages, and that the measure of such damages was the value of the possible life estate to which the plaintiff would be entitled if she survived the defendant:

Held, also, that where a proposal in writing to leave property by will, made to induce a marriage, is accepted, and the marriage takes place on the faith of it, if the proposal relates to a defined piece of real property the Court has power to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers.

APPEAL from a judgment of Mathew, J., on further consideration.

The claim in this action was on an ante-nuptial promise, made by the defendant in consideration of marriage, to leave by will to the plaintiff a certain house and land for her lifetime. It was alleged that the defendant had conveyed his whole estate and interest in the property to third persons, and thereby incapacitated himself from keeping his promise; and the plaintiff claimed a declaration that she was entitled to a life estate in the premises commencing on the death of her husband, and that the conveyance thereof was subject to her life estate, and in the alternative the plaintiff claimed damages for breach of agreement. The agreement relied on was contained in a letter from the defendant to the plaintiff written a short time before the marriage; but the learned judge was of opinion that the result of the evidence was that the letter did not amount to a contract, but only to an

pression of an intention on the part of the defendant to leave the house and land to the plaintiff, and that she had so understood it. He accordingly gave judgment for the defendant.

The plaintiff appealed.

1893. Nov. 30. *Bucknill, Q.C.*, and *Blake Odgers, Q.C.*, for the plaintiff. There was a binding contract to leave the property to the plaintiff for her life, signed by the defendant and consented to by the plaintiff, and on the faith of which the marriage took place. For breach of such a contract damages are recoverable: *Needham* v. *Kirkman* (1); *Goilmere* v. *Battison* (2), sub nom. *Goylmer* v. *Paddiston.* (3)

The defendant has put it out of his power to carry out his promise, and there is therefore an immediate right of action to recover damages for breach of contract: *Hochster* v. *De la Tour* (4); *Short* v. *Stone* (5); *Ford* v. *Tiley* (6); *Frost* v. *Knight.* (7) [They also cited *Maddison* v. *Alderson.* (8)]

Coleridge, Q.C., and *W. Howland Roberts*, for the defendant. The learned judge was right in the view that there was no binding contract. Even if there were a promise, it would be conditional on survivorship, and it does not follow that there will be a breach. These considerations are opposed to the idea that there is an immediate right of action, and there are no cases of an action brought before the death of the promiser. The form of the question asked in *Needham* v. *Kirkman* (1) shews that before the death of the promiser there could be no breach. [They cited also *In re Parkin.* (9)]

Bucknill, Q.C., in reply.

1894. Jan. 17. KAY, L.J., delivered the judgment of the Court. (10) The questions which arise in this case are these:—

1. Was there a binding contract?

2. Was it such a contract as could be enforced in equity, or was there a remedy in damages for the breach of it?

(1) 3 B. & A. 531.
(2) 1 Vern. 48.
(3) 2 Vent. 353.
(4) 2 E. & B. 678.
(5) 8 Q. B. 358.
(6) 6 B. & C. 325.
(7) Law Rep. 7 Ex. 111.
(8) 8 App. Cas. 467.
(9) [1892] 3 Ch. 510.
(10) Lord Esher, M.R., Lopes, L.J., and Kay, L.J.

†

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3. Has the time arrived at which such remedy can be asserted?

4. If the remedy be by way of damages, what amount of damages should be given?

The action was tried by a judge without a jury, so that all questions both of fact and law are open on this appeal.

It will be convenient to consider the questions in the order in which they are stated.

The alleged contract is contained in a letter of December 24, 1883, by the defendant to a lady whom he was desirous to marry, and is in these words:—

"You my love thoroughly understand the terms (and I daresay have told Mr. Woodruff on which we are to put a stop to all this bother by becoming one another) which are that I leave house and land to you for your lifetime. . . . True it is possible but highly improbable that I might come in for the title and should be much better off. Should such a thing happen we could see what I ought and would do for you."

There seems to be no doubt that the house and land referred to were the house and a small piece of land at Ardfield in Devonshire, worth it is said about 60*l.* or 70*l.* a year, in which the defendant was then residing with two daughters by a former marriage. The defendant was not then Sir R. Synge. He succeeded to the title afterwards. The lady who is the plaintiff had some property of her own of which Mr. Woodruff was trustee. He was not a solicitor.

The construction of the letter is plain. It is a statement of the "terms" as to property on which the defendant proposed to marry the lady. The marriage took place on January 5, 1884, ten days after the date of the letter.

It is argued that the plaintiff did not understand it to be a binding promise, and did not so treat it. [The judgment then dealt with the evidence, and continued:—]

The learned judge who decided this case has held that the letter was not treated by the lady as a contract, although by the advice of Mr. Woodruff she preserved it. The inference, however, that she accepted the terms and married on the faith of the promise in writing, seems to us irresistible. We cannot, with

deference to the learned judge, agree in his view that she treated the letter as a mere statement of intention by which the intended husband was not to be bound. The law relating to proposals of this kind before marriage was thus stated by Lord Lyndhurst, L.C., in *Hammersley* v. *De Biel* (1): "The principle of law, at least of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he is not disappointed, and will give effect to the proposal."

We are of opinion that the proposal of terms in this case was made as an inducement to the lady to marry, that she consented to the terms, and married the defendant on the faith that he would keep his word, and that accordingly there was a binding contract on the defendant's part to leave to his wife the house and land at Ardfield for her life.

Then, secondly, what is the remedy? Marriage is a valuable consideration for such a contract of the highest order, and where, as here, the contract is in writing, so that there is no question upon the Statute of Frauds, in the language already quoted, a Court of Equity will take care that the party who marries on the faith of such a proposal "is not disappointed, and will give effect to the proposal."

In *Hammersley* v. *De Biel* (1) the proposal was made on behalf of the intended wife's father, by his authority, and was reduced into writing, and was to the effect that the father would pay down 10,000*l.*, to be settled on the intended husband and wife and their children, the husband to secure a jointure of 500*l.* a year to the wife if she survived him; and then followed the provision on which the question arose, by which the father "proposes for the present to allow his daughter 200*l.* per annum for her private use, ... and also intends to leave a further sum of 10,000*l.* in his will to Miss Thomson, to be settled on her and her children." After the father's death, without having made the promised provision by will, the only child of the marriage—his

(1) 12 Cl. & F. 45, at p. 78.

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mother having died before her father—instituted a suit in equity against his grandfather's executors to recover 10,000*l.* out of his assets. Lord Langdale, M.R., held that by acceptance the proposal had "ripened into an agreement," and that the plaintiff was entitled to the relief he prayed—i.e., to the sum of 10,000*l.*, with interest at 4 per cent. from the end of one year after the father's death, on the footing of a legacy. Lord Cottenham, L.C., affirmed this decision, saying this (1): "I propose, first, to consider whether there was any such agreement previous to the marriage of the plaintiff's father and mother as was binding on the late Mr. Thomson to give an additional 10,000*l.* as the portion of his daughter. If it be supposed to be necessary for this purpose to find a contract, such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum, or in the other evidence in the cause, proof of any such contract; and this may have led to the defence set up by the defendants; but when the authorities on this subject are attended to, it will be found that no such formal contract is required."

This was affirmed in the House of Lords by Lord Lyndhurst, L.C., Lord Brougham, and Lord Campbell, without calling upon the respondents. We have examined the case closely, because it is of the highest authority, not merely as a judgment of the House of Lords, but it was decided by some of the best equity lawyers of that time. Lord St. Leonards has criticized the decision on the ground that the memorandum in that case might have been construed as a mere expression of an intention, not as a definite proposal which could by acceptance ripen into a contract: Sugden's Law of Property, p. 53. But he does not intimate a doubt that the decision was right if the proposal was not merely of an intention which might be changed. Therefore, a definite proposal in writing so as to satisfy the Statute of Frauds to leave property by will, made to induce a marriage, and accepted, and the marriage made on the faith of it, will be enforced in equity.

Then, what is the remedy where the proposal relates to a defined piece of real property? We have no doubt of the power

(1) 12 Cl. & F. 45, at p. 62, n.

of the Court to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers.

It is argued that Courts of Equity cannot compel a man to make a will. But neither can they compel him to execute a deed. They, however, can decree the heir or devisee in such a case to convey the land to the widow for life, and under the Trustee Acts can make a vesting order, or direct that someone shall convey for him if he refuses. And under the like circumstances, the Court has power to make a declaration of the lady's right.

But counsel do not press for such relief, or ask for a declaration to bind the house and land. The relief they ask is damages for breach of contract. It seems to be proved that the grantees of the property under the deeds executed by Sir R. Synge took without notice of the letter; they acquired, as we understand, the legal estate by the grant. If there was any valuable consideration moving from them, no relief in the nature of specific performance could be given against them; and it is suggested that the property, being partly leasehold, according to the decision in *Price* v. *Jenkins* (1), there was such valuable consideration. It is not necessary to examine this argument, as counsel elect to ask for damages only.

Sir R. Synge had all his lifetime to perform this contract; but, in order to perform it, he must in his lifetime make a disposition in favour of Lady Synge. If he died without having done so, he would have broken his contract. The breach would be omitting in his lifetime to make such a disposition. True, it would only take effect at his death; but the breach must take place in his lifetime, and as by the conveyance to his daughters he put it absolutely out of his power to perform this contract. Lady Synge, according to well-known decisions (*Hochster* v. *De la Tour* (2); *Frost* v. *Knight* (3)), had a right to treat that conveyance as an absolute breach of contract, and to sue at once for damages; and as this Court has both legal and equitable jurisdiction, we are of opinion that such relief should be granted.

(1) 5 Ch. D. 619. (2) 2 E. & B. 678.

(3) Law Rep. 7 Ex. 111.

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We have not before us the materials for assessing such damages. The amount must depend on the value of the possible life estate which Lady Synge would be entitled to if she survived her husband. Their comparative ages would, of course, be a chief factor in such a calculation. There must be an inquiry as to the proper amount of damages.

Sir R. Synge must pay the costs of the action here and in the Court below.

Appeal allowed.

Solicitors for plaintiff: *Torr, Janeway, Gribble, Odie, & Sinclair, for Eastley, Jarman, & Eastley, Torquay.*

Solicitors for defendant: *Wood, Bigg, & Nash, for Kitson, Mackenzie, & Hext, Torquay.*

A. M.

1894 *Jan.* 13.

NIND *v.* NINETEENTH CENTURY BUILDING SOCIETY.

Landlord and Tenant—Breach of Covenant to Repair—Liability of Underlessee for Costs of Lessor's Solicitor and Surveyor—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 2—*Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 2, *sub-s.* 1; *s.* 4.

The expression "lessee" in s. 14 of the Conveyancing and Law of Property Act, 1881, and in s. 2, sub-s. 1, of the Conveyancing and Law of Property Act, 1892, includes an underlessee of the whole of the premises comprised in the head lease, and the lessor is entitled to recover from such an underlessee the costs of solicitor and surveyor mentioned in the last-named section.

Burt v. *Gray* ([1891] 2 Q. B. 98) distinguished.

A lessee who, in obedience to a notice from his lessor under s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, remedies the breach of covenant specified and makes the compensation demanded, and thereby renders unnecessary an application to the Court under sub-s. 2, for relief from forfeiture for such breach, "is relieved" under the provisions of that Act, within the meaning of s. 2, sub-s. 1, of the Conveyancing and Law of Property Act, 1892.

APPEAL from the City of London Court.

In the early part of 1884, the plaintiff's predecessor in title, by eleven several indentures of lease, demised eleven houses to different tenants for long terms of years. Such leases contained covenants to repair, with the usual proviso for re-entry on breach. The interests of the several lessees became vested in one Henry Hall, who at the end of 1884 mortgaged the same by way of

underlease to the defendants. In 1892 the plaintiff discovered that the premises were out of repair. He accordingly employed a surveyor to inspect each of the premises comprised in the several leases, and to prepare a schedule of the works necessary to remedy the breach of covenant. He also employed a solicitor to prepare notices under s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, which notices were served by leaving them at the respective houses. The defendants in order to avoid a forfeiture complied with the requirements of the notices, and put the premises into a condition of repair. The plaintiff then brought this action against the defendants to recover the sum of 50*l.* for the costs and expenses incurred by him in the employment of the surveyor and solicitor above mentioned. There was no evidence of any written waiver by the plaintiff of his right of re-entry or forfeiture, nor of any request by the defendants that he should so waive such right. The judge gave judgment for the plaintiff. The defendants appealed.

D'Eyncourt, for the defendants. An underlessee is not a lessee within the meaning of s. 2, sub-s. 1 of the Conveyancing and Law of Property Act, 1892. (1) It is true that, by s. 14, sub-s. 3 of the

(1) By the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 1: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

"(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit."

"(3.) For the purposes of this section a lease includes an original or derivative underlease, ... and a

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Conveyancing and Law of Property Act, 1881, the expression "lessee" is interpreted to include underlessee, but that interpretation is expressly limited to the purposes of that section. But even if that interpretation clause in the earlier Act is to be read into s. 2 of the later Act, that will not assist the plaintiff; for all that that interpretation clause meant was that an underlessee should have a right of relief against ejectment by his own immediate underlessor. In *Burt* v. *Gray* (1) it was expressly decided that an underlessee could not get relief against forfeiture in an action of ejectment brought by the original lessor, with whom he was not privy. Mathew, J., there concurred with the opinion expressed by Kay, J., in the earlier case of *Cresswell* v. *Davidson* (2), that s. 14 of the Act of 1881 does not in any way affect the liability of an underlessee for breach of covenant to repair. The lessee alone is liable for breaches of covenant in the head lease, and it cannot have been intended in s. 2, sub-s. 1,

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lessee includes an original or derivative underlessee."

By the Conveyancing and Law of Property Act, 1892, s. 1: "(1.) The Conveyancing and Law of Property Act, 1881, and the Conveyancing Act, 1882, and this Act, shall be read together."

Sect. 2: "(1.) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and a surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which at the request of the lessee is waived by the lessor by writing under his hand, or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act."

Sect. 4: "Where a lessor is proceeding by action or otherwise, to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any), or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease, or any less term, the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, as the Court, in the circumstances of each case, shall think fit; but, in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease."

(1) [1891] 2 Q. B. 98.

(2) 56 L. T. (N.S.) 811.

of the Act of 1892, that one person should be liable to perform the covenants, and another person should be liable for the costs of solicitor and surveyor, occasioned by the breaches of those covenants. Secondly, assuming that the defendants are lessees within s. 2, it is a condition precedent to the plaintiff's right of action that either he should have given a written waiver of his right of forfeiture, or that the defendants should have been relieved under the provisions of the Acts of 1881 or of 1892. No such waiver was given, nor have the defendants been relieved under those Acts. The relief there referred to is a relief by the order of the Court upon an application forthe purpose; but no such application was ever made.

T. Terrell, for the plaintiff. The defendants are lessees within the meaning of the Act of 1892. By s. 1 of that Act the two Acts of 1881 and 1892 are to be read together; and the interpretation of the expression "lessee" in the earlier Act is applicable to that term when used in the later Act. The case of *Burt* v. *Gray* (1) is no authority against the plaintiff. There the underlease comprised only a part of the premises demised by the head lease, and the judgment turned entirely upon the difficulty of giving relief equitably in such a case. Here the underleases comprise the whole of the premises demised by the respective head leases. As to the objection that the plaintiff did not waive in writing his right of forfeiture, it is a sufficient answer to say that the defendants made no request for such waiver.

D'Eyncourt, in reply. If the judgment in *Burt* v. *Gray* (1) was intended to be confined to underlessees of a part of the demised premises only, and if the Court had under the Act of 1881 power to grant relief to underlessees of the whole premises, what explanation is to be offered of s. 4 of the Act of 1892, which expressly gives power to relieve "any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof"? That language seems to be based upon the assumption that no such power previously existed in the case of underlessees of the whole of the demised premises, any more than in the case of underlessees of a part of such premises.

(1) [1891] 2 Q. B. 98.

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The provision that the two Acts are to be read together does not get rid of the difficulty that the interpretation of the term lessee in s. 14 is expressly limited to the purposes of that section. The plaintiff's contention requires a provision, not merely that the two Acts shall be read together, but that s. 2 of the later Act shall be read as part of s. 14 of the earlier.

DAY, J. I am of opinion that the decision of the judge of the City of London Court must be affirmed. Two points have been argued. The first is, whether an underlessee of the whole of the premises comprised in the head lease is a lessee within the meaning of s. 2 of the Conveyancing and Law of Property Act, 1892, so as to entitle the lessor to recover from him the costs of solicitor and surveyor therein mentioned. I am of opinion that he is. Sect. 14 of the Conveyancing and Law of Property Act, 1881, provides by sub-s. 3 that "a lessee includes an original or derivative underlessee." Then s. 1 of the Act of 1892 provides that the two Acts shall be read together. And reading those two Acts together, without reference to any decisions of the Courts, I should come to the conclusion that the expression lessee as used in s. 2 of the later Act is intended to include an underlessee. But it has been said that the case *Burt* v. *Gray* (1) decides that the provision that lessee shall include underlessee does not apply to a case in which the underlessee is being ejected, not by his own immediate lessor, but by the original lessor. I do not think, however, that *Burt* v. *Gray* (1) decides that at all, or that any such conclusion is to be drawn from the language of Mathew, J. All that was there decided was, that an underlessee of a part of the demised premises was not a lessee within s. 14. The decision did not touch the case of an underlessee of the whole of the demised premises. On the contrary, the stress that was there laid upon the fact that the underlease only comprised a part of the premises comprised in the head lease points to the conclusion that the judges who decided that case would have held an underlessee of the whole premises to be a lessee within the meaning of s. 14. That case therefore, so far from being an authority against the

(1) [1891] 2 Q. B. 98.

plaintiff, goes to support his contention. But it was said that the language of s. 4 of the Act of 1892, which was admittedly passed with the object of getting rid of the effect of *Burt* v. *Gray* (1), applies in terms to underlessees of the whole of the demised premises as well as to underlessees of a part; whereas, if the plaintiff's contention is right, and if the Court already had power under the Act of 1881 to protect underlessees of the whole of the demised premises, the language of the section is unnecessarily wide. It may be that it is so, and that so far as it confers upon the Court a power which they had already got, it is superfluous, but that cannot affect our decision. I am of opinion that in the present case the defendants were lessees within the meaning of s. 2 of the Act of 1892.

The second point was, that the conditions precedent to the right of action under s. 2 had not been satisfied. Those conditions are that either the lessor has, at the request of the lessee, waived his right of forfeiture in writing, or that the lessee has been relieved under the provisions of the Act of 1881 or of that of 1892. With regard to the former, the defendants cannot complain of the want of a written waiver, for they never asked for it. If they had done so they would have got it. But, further, I am of opinion that they were relieved under the provisions of the Act of 1881. They were not, indeed, relieved by any order of the Court, but they were so by the mere operation of sub-s. 1 of s. 14. But for that sub-section the lessor would have been entitled to bring ejectment immediately upon the breach of the covenant, and its operation in staying the lessor's hand must be regarded as a relief, none the less because that relief was obtained without the intervention of the Court. Indeed, it was to supplement relief of that kind alone that it was necessary to pass s. 2 of the Act of 1892. For even under the Act of 1881, if the relief was formally given by the Court, the lessor would have got his reasonable costs of solicitor and surveyor from the lessee, for the Court would always have made it a term of the order granting relief that such costs should be paid. The case of *Skinners Co.* v. *Knight* (2) only decides that such costs cannot be demanded as compensation under

(1) [1891] 2 Q. B. 98. (2) [1891] 2 Q. B. 542.

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sub-s. 1 of s. 14; it does not decide that the Court had no power to award them as a condition of relief under sub-s. 2. I am of opinion, therefore, that the appeal fails upon both points, and that the judgment of the Court below must be upheld.

LAWRANCE, J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Corsellis, Mossop, & Berney.*
Solicitors for defendants: *Griffinhoofe & Brewster.*

J. F. C.

1894
Jan. 17.

NEWBY, APPELLANT *v.* SIMS, RESPONDENT.

Adulteration—Food—Spirits—Admixture of Water—Certificate of Analyst—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 21—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 6.

By s. 6 of the Sale of Food and Drugs Act, 1875, any person selling, to the prejudice of the purchaser, any article of food not of the nature, substance, and quality of the article demanded is liable to a penalty, and by s. 21 the certificate of the analyst is made evidence, and by s. 6 of the Amendment Act of 1879 it is made a good defence to a charge of selling rum adulterated only with water to prove that the admixture has not reduced the rum more than 25 per cent. under proof.

A certificate declared the result of the analysis to be as follows: "I find that the sample contained an excess of water over and above what is allowed by Act of Parliament. I estimate the excess of water at 13 per cent. of the entire sample. I am of opinion that the sample is not a sample of genuine rum":—

Held, that the certificate ought to have stated the proportion of water mixed with the rum, and was insufficient, and a conviction could not be supported.

CASE stated by justices.

At a petty session holden at South Shields an information preferred by the appellant, the inspector of food and drugs for the district, against the respondent, a publican, under s. 6 of the Sale of Food and Drugs Act, 1875 (1), charging that he did

(1) 38 & 39 Vict. c. 63, s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*."

unlawfully sell to the prejudice of the appellant one pint of rum which was not of the nature, substance, and quality of the article demanded, the excess of water being 13 per cent. of the entire sample, contrary to the statute, was heard and determined, and the justices dismissed the information.

Upon the hearing of the information there was put in evidence the following certificate:—(1)

"County of Durham.

"The Sale of Food and Drugs Act, 1875.

"To Mr. John Newby, Sanitary Inspector, Hebburn.

"Analyst's Certificate.

"I the undersigned public analyst for the county of Durham do hereby certify that I received on the 1st day of August, 1893, from yourself a sample of rum, No. 1, for analysis, which then weighed . . . and have analysed the same, and declare the result of my analysis to be as follows: I find that the sample contained an excess of water over and above what is allowed by Act of Parliament. I estimate the excess of water at 13 per cent. of the entire sample. I am of the opinion that the sample is not a sample of genuine rum." (Signed by the analyst.)

The respondent's solicitor objected that the certificate of the analyst was not in its form and words sufficient evidence to justify a conviction.

The justices, being of opinion that the public analyst's certificate in the above form, whereby the public analyst purported to "estimate" the excess of water at 13 per cent. of the entire sample, although in other parts of the same certificate he used the words "I find" and "I am of opinion," was not sufficient evidence of the offence charged to justify them in convicting the respondent, dismissed the information.

The question for the opinion of the Court was, whether the justices were right, having regard to the language of the certificate, in dismissing the information on the ground that the public analyst's certificate was not sufficient evidence of the offence charged.

(1) By s. 21 of the Sale of Food and Drugs Act, 1875, the certificate of the analyst is evidence unless the defendant requires that the analyst shall be called as a witness.

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Macmorran, for the appellant. The certificate was sufficient, and the justices ought to have convicted. By the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 6, it is a good defence to a charge of this nature to prove that the admixture of water has not reduced the rum more than twenty-five degrees under proof. The analyst and the parties must be taken to know the law, and to be aware of the existence of this provision, and therefore it is quite clear that "over and above what is allowed by Act of Parliament" in the certificate must mean over and above 25 per cent. under proof, and that the excess of water which is estimated at 13 per cent. means the excess beyond 25 per cent. under proof. The certificate therefore amounts to a finding that the strength of the sample was 38 per cent. under proof, and there is, moreover, the express finding that it was not genuine rum.

John Strachan, for the respondent. The Adulteration Acts are penal, and should be construed strictly. The justices were right in holding that the expressions used in the certificate were too vague. What the statute requires is a quantitative analysis. The certificate ought to state the quantity of water above which there is an excess of 13 per cent. In giving a certificate in this form the analyst is taking upon himself to construe the statute, but that is for the justices.

[*Webb* v. *Knight* (1) and *Bakewell* v. *Davis* (2) were referred to.]

Macmorran, replied.

DAY, J. I have come to the conclusion that we ought to support the decision of the magistrates, but not on the ground on which that decision was based; for I am clearly of opinion that the grounds given by the magistrates were wrong, although their decision was right. I am sorry to be obliged to come to this conclusion, because in my opinion the Adulteration Acts ought to be liberally construed, and ought not to be treated as statutes which abridge the liberty of the subject. I do not in any way yield to Mr. Strachan's argument that the statutes are penal, and ought therefore to be construed strictly. In my opinion, we ought only to apply to these Acts such strictness as

(1) 2 Q. B. D. 530. (2) Ante, p. 296.

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ought to be applied to all statutes. At the same time it is no doubt true that all offences with which people are charged must be strictly proved. In the present case the statute allows the certificate to be used as evidence. If the respondent had availed himself of his right to require the analyst to be called as a witness, possibly the defect in the evidence would have been supplied; but as he did not require the analyst to be called, the certificate is the only evidence in the case. I am of opinion that on the face of the certificate no offence is proved. The certificate is entitled "The Sale of Food and Drugs Act, 1875," and contains no reference to the Act of 1879, and there is no evidence that the analyst ever knew of this latter Act, or that he acted under it or had it before him. The certificate is in these terms: "I the undersigned public analyst for the county of Durham do hereby certify that I received on the 1st day of August, 1893 from yourself a sample of rum, No. 1, for analysis, which then weighed . . . , and have analysed the same, and declare the result of my analysis to be as follows: I find that the sample contained an excess of water over and above what is allowed by Act of Parliament. I estimate the excess of water at 13 per cent. of the entire sample. I am of the opinion that the sample is not a sample of genuine rum." I am of opinion that this certificate is defective, but not upon the ground that the analyst states in it that he estimates the quantity of water, for that, in my opinion, is an appropriate word to express the result of his calculation. He states that he "finds," that he "estimates," and that he "is of opinion," and I can see no objection to any one of those expressions. The objection, however, is this: Before 1875 the word "proof" only was to be found in the Acts relating to the strength of spirits (1), and proof spirit means that which contains 50·76 of water, as against 49·24 of pure alcohol, that is to say, pure alcohol and water in nearly equal quantities. Then the Act of 1875 leaves the question at large as to what admixture of water is permissible in the case of the sale of rum, for it is manifest that there must be a certain quantity of water in all spirits, and by that Act it was left to

(1) See 58 Geo. 3, c. 28 (repealed in part by 36 & 37 Vict. c. 91) and the former Acts there recited.

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popular estimation as to what quantity of water mixed with spirits would amount to adulteration. In the Act of 1879 there is no definition of the offence; but the Act contains a negative provision, for by s. 6, "in determining whether an offence has been committed under s. 6 of the said Act" (of 1875) "by selling, to the prejudice of the purchaser, spirits not adulterated otherwise than by the admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than 25 degrees under proof for brandy, whisky, or rum, or 35 degrees under proof for gin." That provision recognises proof as the standard of strength, and there is no other definition of the excess of water which is prohibited, except what is contained in that negative provision. In the present case all that the analyst states in his certificate is that he finds the excess of water to be 13 per cent. over and above that which is allowed by Act of Parliament. It comes to this, that he takes upon himself to act as the judge of law and fact; whereas those questions are for the magistrates to determine. To enable us to act on the certificate we must know what the analyst finds in fact. The statement as to an excess of 13 per cent. is quite insufficient, for there is no statement above what amount in fact the excess is. The analyst ought to determine as a matter of fact how much water there is in the pint of rum, and, as he has not done so, the certificate is not in such a form as to amount to evidence on which the magistrates could act.

LAWRANCE, J. I am of the same opinion, though I differ from the grounds on which the magistrates decided; but at the same time the certificate should contain evidence, and not only the conclusion at which the analyst has arrived. I am, therefore, of opinion that the conclusion arrived at by the magistrates was right, but not on the grounds on which they decided.

Judgment for the respondent.

Solicitors for appellant: *Iliffe, Henley, & Sweet, for Mabane & Graham, South Shields.*

Solicitor for respondent: *J. Kirkley, for Davidson & Barker, South Shields.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1893
Dec. 1, 2, 19.

FURNESS, WITHY & COMPANY, LIMITED *v.* W. N. WHITE & COMPANY, LIMITED.

Ship—Bill of Lading—Freight—Liability from Receipt of Goods under Bill of Lading—Consignee—Lien—Warehousing Cargo — Deposit — Delivery of Goods—"Legal Proceedings"—"Owner of Goods"—Merchant Shipping Acts Amendment Act, 1862 (25 & 26 *Vict. c.* 63), *ss.* 66–72.

By the Merchant Shipping Act, 1862, ss. 66–68, a shipowner is at liberty to land goods imported in his ship from foreign parts upon their owner (which includes any person entitled to the possession) failing to take delivery, and may place the goods in the custody of a warehouse owner, subject to a lien for freight. By s. 70, the owner of the goods may deposit with the warehouse owner a sum of money equal to the amount claimed by the shipowner, and thereupon the lien shall be discharged, but without prejudice to any other remedy which the shipowner may have for the recovery of freight. By s. 71 and 72, the sum deposited is to be paid to the shipowner, if there is no dispute between the shipowner and the owner of the goods as to the amount properly payable for the freight; and in the event of any such dispute the shipowner is to be paid so much of the deposit as the owner of the goods admits to be due, and the balance is to be returned to the owner of the goods unless the shipowner takes proceedings to recover it:—

Held, by the majority of the Court of Appeal (Lindley and A. L. Smith, L.JJ., Davey, L.J., dissenting), that the deposit under the Act is not equivalent to, but only a security for, the payment of freight; and accordingly that the above sections do not affect the liability to freight of the consignee of goods named in a bill of lading, but without property therein, which liability may otherwise be inferred from his receipt of the goods under such bill of lading.

Where, therefore, the consignee (not being the owner) of goods under a bill of lading made a deposit under the Act equivalent to the full amount of freight, accompanied by a notice to retain the deposit pending instructions, and accordingly had the goods delivered to him:—

Held, by Lindley and A. L. Smith, L.JJ. (Davey, L.J., dissenting), that the shipowner, notwithstanding such deposit, had an independent right of action against the consignee for the full amount of the freight.

ACTION for freight.

At the trial before Day, J., it appeared that the plaintiffs were shipowners carrying on business in London, and the defendants also carried on business in London as fruit and produce brokers and commission agents, and were in the habit of receiving large consignments of foreign fruit for sale by auction in London. In all cases of consignment to the defendants of foreign fruit they

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acted for the shippers as merely agents to sell, and on sale of the goods remitted the proceeds, less the commission and incidental expenses, to the shippers abroad. In the present case a cargo of Canadian apples in barrels was shipped in the plaintiffs' steamship *Inchulva* for carriage from Halifax, Nova Scotia, to London, the cargo being consigned to the defendants for sale under a bill of lading which specified the number of barrels "marked and numbered as in the margin, and to be delivered from the ship's deck where the ship's responsibility shall cease, in the like good order and condition at the aforesaid port of London . . . . unto W. N. White & Co., or to their assigns, freight and charges payable by consignees as per margin." To the bill of lading was appended a condition "that the property shall be discharged from the ship into transit sheds or otherwise, as soon as she is ready to unload, by the agents of the owners of the vessel, and is to be entered by the consignees at the Custom House within twenty-four hours after the ship is reported"; also the following London clause: "The shipowners shall be entitled to land these goods on the quays of the dock where the steamer discharges immediately on her arrival; and upon the goods being so landed the shipowners' responsibility shall cease. This is to form part of this bill of lading, and any words at variance with it are hereby cancelled."

The steamer arrived in the Victoria Docks, London, on Saturday, December 10, 1892. The defendants had then no knowledge of the consignment to them, and, therefore, were not at the discharging berth ready to take delivery of the cargo on its arrival. Accordingly, the captain, acting under the provisions of s. 67 of the Merchant Shipping Acts Amendment Act, 1862 (25 & 26 Vict. c. 63), and of the London clause in the bill of lading, proceeded to land the cargo into a warehouse of the London and India Docks Joint Committee.

The discharge into the warehouse was completed by noon on Tuesday, December 13, 1892. On the landing of the cargo the plaintiffs gave notice to the Docks Committee that the goods were to remain subject to a "stop" or lien for freight. On the previous day, the 12th, the defendants heard for the first time of the steamer's arrival and of the consignment to

them; and thereupon, on the same day, the 12th, they sent to the Docks Committee a cheque for 152*l.* 17*s.* 1*d.*, being the amount calculated by the defendants from the margin of the bill of lading. The cheque was inclosed in the following letter to the committee:—

"Dear Sirs,—We herewith hand you cheque for freight under the Merchant Shipping Amendment Act, cap. 63, ss. 68, 69, 70, 71, 72, and request you to hold same pending the receipt of your landing account and our further instructions.—Yours truly, W. N. White & Co., Limited; Wm. Nich. White, Managing Director." The 152*l.* 17*s.* 1*d.* was a miscalculation on the part of the defendants, the proper sum being 148*l.* 16*s.* 3*d.*

The cheque and letter were received by the Docks Committee the next day, the 13th; and thereupon, on the same day the following letter was written on behalf of the committee to the plaintiffs:—

"London and India Docks Joint Committee, Royal Victoria Dock, December 13, 1892.—Gentlemen, I am directed to inform you that Messrs. W. N. White & Co., Limited, have deposited 152*l.* 17*s.* 1*d.* with this committee for freight, &c., on apples. *Inchulva*, Captain —— from Halifax, and have given notice to retain 152*l.* 17*s.* 1*d.* I am, gentlemen, your obedient servant, Woodward."

The defendants having deposited the 152*l.* 17*s.* 1*d.* with the Docks Committee, and given the notice of December 12, 1892, sent their vans to the warehouse to take away the goods, and the whole of the consignment was delivered out to them under the bill of lading, as to part on December 13—the day the landing into the warehouse was completed—and as to the remainder on the 14th.

The plaintiffs being unable, in consequence of the defendants' notice to the Docks Committee, to obtain from the latter the 148*l.* 16*s.* 3*d.* deposit, representing their freight, wrote to the defendants on December 13, threatening to issue a writ for the freight unless paid on that day, as they, the plaintiffs, declined to have it tied up in the hands of the Docks Committee for the thirty days provided by s. 72 of the Act. The defendants, however, insisted that they had only acted within their rights;

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whereupon the plaintiffs, in the afternoon of the same day, the 13th, issued the writ in this action claiming payment of the 148*l.* 16*s.* 3*d.* freight. The writ was served on the defendants the following day, the 14th; but on that day, before they had been served, they wrote to the plaintiffs stating that, as the Docks Committee had received the goods, they, the defendants, had a right to the delivery of them under the Act of 1862; they also denied the plaintiffs' statement that the freight would be locked up for a month, inasmuch as, upon the goods being delivered to the defendants in proper order, the dock company would immediately pay over the freight less any "shorts" or damage for which the ship was liable. They further submitted that they had only acted in accordance with the provisions of the Act, and stated their intention of acting in the same manner in the future, in order to avoid delay in settling just claims.

On the same day, the 14th, and again before service of the writ, the defendants wrote to the Docks Committee, directing them to pay the 148*l.* 16*s.* 3*d.*, the corrected amount for freight, to the plaintiffs, less a sum of 15*s.* for "3 barrels broken and plundered at 5*s.* each." Accordingly, the next day, the 15th, an agent of the Docks Committee tendered the plaintiffs the 148*l.* 16*s.* 3*d.*, less the 15*s.*; but the plaintiffs refused to accept it, on the ground that the action had already been commenced, and that they did not admit their liability for the 15*s.* Ultimately the 148*l.* 16*s.* 3*d.* was paid into Court in the action. The defendants resisted the action on the ground that they were not parties to the bill of lading, and that the shipper of the goods was not their agent; that they were only agents for the sale of the apples, and were not indorsees of the bill of lading within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111); that there was no express or implied promise on their part to pay the freight; and that at the time of action brought the plaintiffs had not delivered the goods to the defendants, and had not released the stop for freight which they had placed upon the goods under the provisions of the Act of 1862.

After the defence had been put in, the plaintiffs amended

their statement of claim by claiming, in the alternative, a lien on the money deposited with the Docks Committee.

The learned judge held that, as the defendants had taken delivery of the goods, they were subject to an implied contract to pay the freight; and that the plaintiffs were, therefore, entitled to judgment against them for the 148*l.* 16*s.* 3*d.* freight.

The defendants appealed.

Channell, Q.C., and *Cranstoun*, for the defendants. The defendants, though named as consignees in the bill of lading, were only agents, and no property passed to them by the consignment; so that an agreement to pay charges could not be supported on evidence which would have been sufficient if they had been owners. Apart from the Merchant Shipping Act Amendment Act, 1862 (1), if the consignees, being owners,

(1) By the Merchant Shipping Act, 1862, ss. 66 to 68, a shipowner is at liberty to land goods imported in his ship from foreign parts whenever their "owner" (which includes "every person who is for the time being entitled, either as owner or agent for the owner, to the possession of the goods, subject in the case of a lien, if any, to such lien") fails to take delivery thereof, and may place the goods in the custody of a warehouse owner, subject to a lien for freight or other charges payable to the shipowner.

By s. 70 the owner of the goods may deposit with the warehouse owner a sum of money equal in amount to the sum claimed as due by the shipowner, and thereupon the lien shall be discharged, "but without prejudice to any other remedy which the shipowner may have for the recovery of the freight."

Sect. 71: "If such deposit is made with the warehouse owner, and the person making the same does not within fifteen days after making it give to the warehouse owner notice in writing to retain it, stating in such notice the sum, if any, which he admits to be payable to the shipowner, or, as the case may be, that he does not admit any sum to be so payable, the warehouse owner may, at the expiration of such fifteen days pay the sum so deposited over to the shipowner, and shall by such payment be discharged from all liability in respect thereof."

Sect. 72: "If such deposit is made with the warehouse owner, and the person making the same does within fifteen days after making it give to the warehouse owner such notice in writing as aforesaid, the warehouse owner shall immediately apprise the shipowner of such notice, and shall pay or tender to him out of the sum deposited the sum, if any, admitted by such notice to be payable, and shall retain the balance, or, if no sum is admitted to be payable, the whole of the sum deposited, for thirty days from the date of the said notice; and at the expiration of such thirty days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the

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came to the shipowner and induced him to give up the goods, that would be evidence of a new contract, on which they would be personally liable to pay the charges named in the bill of lading; but the acceptance of the goods does not, as an inference of law, create a contract, making the consignees liable to pay those charges: *Sanders* v. *Vanzeller* (1); *Kemp* v. *Clark*. (2) But in the present case the goods were delivered to the defendants under the Act, and they entered into no contract to pay freight except according to the provisions of the Act. By s. 68 of the Act, when the goods were placed in the warehouse, the shipowners had the same lien as if the goods had remained on board the ship. The deposit of the amount of freight under s. 70 discharged the lien; but though the section provides that this discharge is to be without prejudice to any other remedy the shipowner may have for the recovery of his freight, it does not give him any additional remedy. It is argued that s. 72 does provide that an action shall lie against the consignee who, by force of the definition clause, comes within the term "owner of the goods" as being the person entitled to possession of them. But the section is not so expressed as to confer any fresh right of action. The plaintiffs may have a right to recover their freight out of the sum deposited, but there is no right of action against the defendants personally. The effect of the deposit by the defendants was to discharge the plaintiffs' lien under s. 70: when the freight was discharged and the lien was gone the defendants were entitled to the possession of the goods.

Pickford, Q.C., and *Hugh Boyd*, for the plaintiffs. The shipowner's lien given by s. 68 is his right to retain the goods until his freight is paid. The only method by which he can get any portion of his freight, if disputed, is by action, under s. 72, against the "owner of the goods," an expression which, by s. 66,

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goods to recover the said balance or sum or otherwise for the settlement of any disputes which may have arisen between them concerning such freight or other charges as aforesaid, and notice in writing of such proceedings has been served on him, the warehouse owner shall pay the said balance or sum over to the owner of the goods, and shall by such payment be discharged from all liability in respect thereof."

(1) 4 Q. B. 260; 11 L. J. (N.S.) (Q.B.) 241.

(2) 12 Q. B. 647.

includes every person who is for the time being entitled, as agent for the owner to the possession of the goods. That covers this case; for if the defendants are not actual owners they are at all events agents for the owner, the foreign principal. The shipowner's right of action under s. 72, is not against the warehouse owner or against the principal as actual owner of the goods, but against the person who makes the deposit under s. 70. The intention of the statute is to put the agent who makes the deposit in the same position as the person—the owner of the goods—who is liable to pay the freight. On the arrival of the goods, the consignee indorses the bill of lading and sends it to the warehouse owner with a request to take delivery, so far as he can, for him, the consignee. But when once the goods are in the keeping of the warehouse owner, the consignee cannot get back the goods without payment of the freight, for, under ss. 68 and 69, until the freight is paid the goods are not discharged. The deposit which may be made under s. 70 is merely for the purpose of enabling the consignee to obtain the goods with despatch, and does not free him from the liability to freight. The shipowner's right to sue the consignee in such a case as this is not upon the contract contained in the bill of lading, but upon a new or implied contract to pay the freight, the consideration to support such implied contract being the delivery of the goods to, and the acceptance of them by, the consignee. According to the custom of the Port of London, and by the course of business between the parties, the Docks Committee, directly the goods passed over the ship's side, became agents for delivery on the quay. In fact the Docks Committee hold a dual position: first, being ready to take over the goods, they become agents to receive delivery; and, secondly, they are statutory stakeholders.

Channell, Q.C., in reply. Even assuming s. 72 to give the respondents a right of action, the facts here are not such as to support such an action. The defendants, on making the deposit, never gave the notice required by s. 71, stating either the sum admitted by them to be payable to the plaintiffs, or that they did not admit any sum to be so payable. The defendants cannot be held liable for any mistake made by the Docks Committee,

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as the warehouse owners, in giving notice to the plaintiffs under s. 72. If the defendants entered into any contract to pay freight it was only according to the Act. If s. 72 gives a right of action within the thirty days, the right of action does not arise until the person making the deposit chooses to state how much money he admits to be payable to the shipowner, and how much he disputes. Here the defendants only gave a notice to retain the amount of the deposit, without saying how much they admitted to be due to the plaintiffs, and how much they disputed; for the direction to deduct the 15*s.* was made after action brought. Accordingly, the circumstances did not give the plaintiffs a right of action at the time this action was commenced.

Cur. adv. vult.

1893. Dec. 19. LINDLEY, L.J. The question raised by this appeal is new and important. It is whether a mere consignee for sale of a cargo shipped abroad and delivered to him here out of a warehouse under a bill of lading is liable to be sued for the bill of lading freight, although he has deposited the amount of such freight under the provisions of the Merchant Shipping Acts Amendment Act, 1862 (25 & 26 Vict. c. 63). To decide this question it is necessary to consider, first, his liability apart from that statute; and, secondly, his liability since it passed.

Apart from the statute, the liability of a consignee or indorsee of a bill of lading to pay the bill of lading freight on delivery of the goods to him was and is clear and undoubted. Such liability arises from a real though tacit contract—a contract not expressed in the bill of lading, to which he is no party, but to be inferred from the conduct and obvious intentions of the shipowner and himself. It would be unbusinesslike and highly improbable that a shipowner would give up his lien for freight and deliver the goods to the consignee or indorsee unless he undertook to pay the freight; and it would be equally unbusinesslike and improbable that the consignee or indorsee would expect to obtain possession of the goods except upon the terms of paying the freight for which the shipowner had a lien upon them. A promise to pay is inferred as a matter of course from delivery unless there

are other circumstances to rebut the inference. But the promise so inferred is, as already stated, a promise in fact, and not one of those so-called implied promises in law which are imputed irrespective of intention. This was settled in *Sanders* v. *Vanzeller* (1); *Kemp* v. *Clark*. (2) The consideration for the promise to pay the freight is the delivery of the goods to the consignee or indorsee of the bill of lading. The consideration is not the mere abandonment of the lien, but the delivery of the goods. The lien may be waived, or even released under seal; and yet, if the consignee or indorsee does not get delivery of the goods, he will not be liable to pay the freight unless a distinct promise to pay it in consideration of a release of the lien, as distinguished from a delivery of the goods, can be proved. Such a promise is, no doubt, theoretically possible, but I do not suppose it has ever been heard of in business. It is, however, important to bear in mind that it is the delivery of goods which is the consideration for the consignee's promise to pay the freight; and, apart from the statute, a consignee named in a bill of lading or an indorsee of a bill of lading had to pay the bill of lading freight on delivery of the goods to him, unless he could shew circumstances relieving him from this obligation, as in *Smidt* v. *Tiden*. (3)

If the consignee or indorsee is also the owner of the goods, he is liable to pay the freight as if he had entered into the contract contained in the bill of lading. But this liability has been imposed by statute 18 & 19 Vict. c. 111, and does not depend on a contract to be inferred from the mere delivery of the goods to him.

Such being the liability of a consignee or indorsee of a bill of lading apart from the Merchant Shipping Acts Amendment Act, 1862, I pass on to consider the effect of that part of the Act which bears upon this question—viz., s. 66 and the following sections. The object of the legislature in passing this part of the Act will be found explained in *Meyerstein* v. *Barber* (4) and *Mors-le-Blanch* v. *Wilson* (5), where the inconveniences of landing goods in warehouses and so creating another lien are illustrated.

(1) 4 Q. B. 260.
(2) 12 Q. B. 647.
(3) Law Rep. 9 Q. B. 446.
(4) Law Rep. 2 C. P. 38.
(5) Law Rep. 8 C. P. 227.

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In reading the statute it must be borne in mind that it is the duty of the consignee or indorsee of a bill of lading to be ready to receive the goods as soon as the ship arrives and the master is ready to deliver them. It is only where there has been failure on the part of the consignee or indorsee to take delivery direct from the ship on arrival that the necessity for warehousing the goods arises. Now, by the Act in question provision is made (1.) for enabling the owner of any ship arriving from foreign parts to land the goods on a wharf or in a warehouse (s. 67); (2.) for preserving his lien for freight and other charges on the goods so landed (s. 68); (3.) for the discharge of this lien, either by the production of a receipt or release from the shipowner (s. 69), or by a deposit by the owner of the goods of the amount claimed for freight and other charges (s. 70); (4.) for the payment by the warehouseman to the shipowner of the whole deposit in fifteen days if there is no dispute between the shipowner and the owner of the goods as to the amount properly payable for the freight, &c. (s. 71); (5.) for the payment by the warehouseman to the shipowner of so much of the deposit as is admitted by the owner of the goods, and for returning the balance to the owner of the goods unless the shipowner shall within thirty days take proceedings to recover the amount in dispute from the owner of the goods (s. 72). Throughout these sections the expression "owner of the goods" includes agents entitled to the possession of the goods—e.g., consignees for sale (s. 66).

Now, in providing this machinery, I can discover no indication of any intention on the part of the legislature to alter the consignee's liability to pay the freight on delivery to him. Nay, more, the legislature has expressly negatived any such intention: see the words at the end of s. 70. It is contended, however, that these words can only apply to cases where the shipowner has a remedy by action on the bill of lading itself, and that they do not apply to a mere consignee for sale, whose liability depends on a contract to be inferred in each particular case from the circumstances of that case; and that no promise by him to pay freight can be inferred when he deposits the amount claimed. It is, moreover, urged that, as on making the deposit he is entitled by the statute to receive the goods, there is no con-

sideration for any promise to pay the freight on delivery. This argument is ingenious, but to my mind not convincing. The introduction of the machinery of a deposit was for the benefit both of the shipowner and of the consignee. It enables the shipowner to discharge his ship without risking the loss of his lien, and it enables the consignee to obtain the goods without waiting to settle disputes. But the deposit is not equivalent to payment; it is only a security for payment; and it is clear to my mind that the deposit was never intended to deprive the shipowner of any right of action which, apart from the deposit, he would have had against a consignee obtaining the goods. This is, I think, made plain by the language of s. 72, which clearly contemplates and expressly authorizes legal proceedings by the shipowner against the goods-owner for the recovery of money from him. The legal proceedings here referred to are such as were usual in such cases—viz., an action for the freight—and the statute has always been so construed. I do not say that a suit in equity by the shipowner against the consignee making the deposit and the warehouseman to obtain payment out of the deposit might not be had recourse to. On the contrary, I have no doubt it might, and in some cases—as, for instance, if the consignee were insolvent, or in such cases as *Smidt* v. *Tiden* (1)—such mode of proceeding would be best. But no legislative enactment is required to give the shipowner such a remedy as this. Some provision, however, was necessary to give the shipowner a remedy against the consignee personally, as the deposit discharged the lien. Such a provision is found in s. 72, even if s. 70 is insufficient for the purpose, as perhaps it is, or would be if its construction were not aided by s. 72.

I come, therefore, to the conclusion that the statute 25 & 26 Vict. c. 63, preserves the liability which, but for the deposit made under its provisions, would have been incurred before it passed by an agent for sale to pay the bill of lading freight upon delivery of the goods to him.

The application of this view of the Act to the facts of the present case is easy. A cargo of apples belonging to some one in Canada was shipped in the plaintiffs' ship for carriage from

(1) Law Rep. 9 Q. B. 446.

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Halifax, Nova Scotia, to London. The apples were consigned to the defendants for sale, and by the bill of lading were made deliverable to them or their assigns, "freight and charges payable by consignees as per margin." The ship arrived in the Victoria Docks on Saturday, December 10, 1892. On the 12th the defendants heard of her arrival, and they paid the sum of 152*l.* 17*s.* 1*d.*, being the amount calculated by the defendants from the margin of the bill of lading, to the dock company, and at the same time the defendants gave the company notice not to part with the money until further instructions. All this was done before the apples were landed. They were landed on the 13th, and the defendants, having deposited enough, became entitled to take them away, but, owing to the defendants' letter of the 12th, the plaintiffs could not get the freight. On the 13th the writ in this action was issued by the plaintiffs against the defendants for 148*l.* 16*s.* 3*d.*, the amount of freight claimed for the apples landed. The difference between this sum and the 152*l.* was some miscalculation, and is immaterial. After the writ was issued the defendants released the sum deposited; but it has not, as I understand, been accepted by the plaintiffs in consequence of these proceedings. The money has since been paid into Court in this action.

If I am right in the construction of the statute, the defendants are personally liable for the freight. This was the view taken by Day, J. Whether the true view is that the old liability remains notwithstanding the deposit, or that the statute has substituted a fresh liability for the old one wherever it would have existed but for the deposit, admits of some doubt, which, however, is of no importance in this case. Whichever view is theoretically the more correct, the defendants are wrong. Their contention has been throughout that having made a sufficient deposit they were entitled to have the apples, and were under no personal liability to pay the freight. If this contention were correct, the defendants would get the apples and the plaintiffs would not get the freight, which might be detained from them for some time. The contention of the defendants is not in accordance with the usual course of business, and this action has been brought in order to have the question of their liability

decided. The decision ought, in my opinion, to be against the defendants, and their appeal ought therefore to be dismissed with costs.

A. L. SMITH, L.J. The main question in this case is whether a shipowner who has carried goods in his ship from a foreign port to this country and has landed them into a warehouse pursuant to s. 67 of the Merchant Shipping Acts Amendment Act, 1862, can maintain an action at law for freight against a consignee named in a bill of lading who is agent for sale in this country of a foreign shipper, and to whom no property in the goods has passed, when such consignee has taken delivery of the goods ex warehouse and made the deposit prescribed by the Act. The amount in dispute is small, being 15*s.*; but the question is one of considerable practical importance, for the point raised by the defendants is whether a shipowner, in the circumstances of the case, is obliged to have recourse to the goods-owner for his freight, and, if necessary, sue him upon the other side of the Atlantic; or whether he can sue in an action at law the receiver of cargo here, and thus settle all matters in dispute regarding the freight with him.

The facts are as follows. The plaintiffs carried a consignment of apples in their steamship from Halifax, Nova Scotia, to London, under a bill of lading which made them deliverable to the defendants or their assigns, he or they paying freight for the same in cash upon delivery; and it was also therein provided that the shipowners should be entitled to land the goods on the quays of the dock where the steamer should discharge immediately on her arrival. No property in the apples passed to the defendants, and consequently they were not bound by the contract contained in the bill of lading between the shipowners and the foreign shipper. The ship arrived in London on December 10, 1892. The defendants had made no entry and were not at the discharging berth ready to take delivery of the apples ex ship; and thereupon the captain, under the provisions of the Act and of the bill of lading, as he lawfully might do, proceeded to land them into a warehouse of the London and India Joint Docks Committee, which landing, as Day, J., found, was

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completed upon December 13, before the writ in this action was issued. Upon December 12, 1892, and before the discharge into warehouse was completed, the defendants sent the following notice to the warehouse owners. [The Lord Justice read the letter of that date, and continued:—]

The 152*l.* 17*s.* 1*d.* arose from the miscalculation by the defendants of what the freight would come to; it should have been 148*l.* 16*s.* 3*d.*

The dock company (who were the warehouse owners), upon receipt of the notice from the defendants, wrote to the plaintiffs as follows. [The Lord Justice read the letter from the Docks Committee of December 13, 1892, and continued:—]

The plaintiffs thereupon, in the afternoon of December 13, issued the writ in this action claiming the freight due—148*l.* 16*s.* 3*d.*—which was served upon the defendants on December 14, 1892.

The defendants, having deposited the 152*l.* 17*s.* 1*d.* with the dock company, and given the notice of December 12, 1892, as above mentioned, took delivery of the apples ex warehouse. They now assert that in these circumstances they are not liable to be sued at law by the plaintiffs for freight. They also assert that there were three broken and plundered barrels of apples; or, in other words, that there was a short delivery of three barrels, and consequently 15*s.* should be deducted from the freight of 148*l.* 16*s.* 3*d.* They say that, having deposited the amount of freight claimed with the warehouse owners pursuant to the provisions of ss. 70 and 71 of the Act, no further liability attaches to them.

Now, it cannot be doubted, if the defendants were consignees of the goods mentioned in the bill of lading, to whom the property therein had passed, that in the circumstances which exist in this case they could be sued here at law by the plaintiffs for freight, and that this question of 15*s.* would be decided in that action, and that the deposit with the warehouse owners by the defendants of the freight claimed would be no answer at all. They would be liable, by reason of the Bill of Lading Act, 18 & 19 Vict. c. 111, which conferred the contract contained in the bill of lading upon them, and there is no dispute as to this.

In my judgment, it is also clear that, if the defendants had made entry and had taken delivery of the goods ex ship, they could have been successfully sued at law for freight by the plaintiffs, not upon the contract contained in the bill of lading, but by reason of having accepted the goods under the bill of lading, for this would be good evidence of a new contract to pay freight according to its terms, and any jury or judge would so hold. To repeat an expression of the late Willes, J., there is a bushel of authorities to support this proposition.

The consideration for this new contract would be the shipowner parting with the goods to the consignee, and thereby abandoning his lien.

It was, however, argued for the defendants that they were not liable to be sued, for that they were neither consignees named in the bill of lading to whom the property in the goods had passed, nor had they taken delivery of the goods ex ship; and that the circumstances under which they did take delivery of the goods afforded no evidence of a new contract to pay freight; and moreover, if they did, there was no consideration for such a contract, the shipowner's lien having been lost by reason of the deposit of the freight claimed by the defendants under the Act of 1862. I would point out that, if no legal proceedings can be maintained against the defendants, this strange result will follow by reason of the provisions of the Act—viz., that a consignee, by neglecting to make entry and to be ready at the ship's side to receive the goods he is about to receive, can compel a shipowner to resort to the warehousing clauses of the Act, and then, having made the deposit and thus obtained possession of the goods, can force the shipowner to sue the goods-owner for freight wherever he may happen to be; whereas, if the consignee took the goods, as he should, ex ship, he would be liable to be sued for freight; or, in other words, if a consignee does what he ought to do, he can be sued personally for freight, and if he does what he ought not he cannot be.

That it is the duty of a consignee to be ready to take freight is clear: see *Wright* v. *New Zealand Shipping Co.* (1), and *Postlethwaite* v. *Freeland.* (2) Willes, J., in *Meyerstein* v.

(1) 4 Ex. D. 165. (2) 5 App. Cas. 599.

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Barber (1), traced the history of the warehousing clauses of the Act of 1862, and it will be seen that they were passed for the benefit of shipowners and not of consignees.

It appears to me not necessary to decide the point which was so much argued at the bar for the defendants whether, by taking delivery of the goods ex warehouse under the circumstances existing in this case, they have afforded good evidence of a new contract for good consideration to pay the bill of lading freight; for, in my judgment, when a shipowner lands goods into a warehouse pursuant to the Act of 1862, and a consignee makes a deposit and thus gets rid of the shipowner's lien, and obtains possession of the goods and gives the prescribed notice, s. 72 of the Act designates such consignee as the person against whom legal proceedings to recover the amount of freight not admitted to be due, or otherwise for the settlement of any disputes which may have arisen concerning the same, are to be taken, and that these legal proceedings include at any rate an action at law.

Sect. 67 of the Act of 1862 provides that if the owner of goods imported in any ship from foreign parts into the United Kingdom (and the term "owner of goods" by s. 66 includes a person for the time being entitled to the possession of the goods as agent for the owner, and exactly describes the defendants' position) fails to make entry of the goods, or, having made entry thereof, fails to land and take delivery of them with all convenient speed, the shipowner may make entry and land the same at the times and subject to the conditions of the section. This, it is admitted, is what the shipowner in this case has rightfully done.

By s. 68 the shipowner, by giving the prescribed notice to the warehouse owner, may preserve his lien for freight, and that lien continues until proof of payment under s. 69.

Sect. 70, however, provides that an owner—which, as before stated, includes an agent for the owner—entitled to the possession of the goods may deposit with the warehouse owner a sum equal to the amount of freight claimed; and thereupon the shipowner's lien is discharged, without prejudice to any other

(1) Law Rep. 2 C. P. 54, 55.

remedy which the shipowner may have for the recovery of the freight.

If the Act had stopped here, the point as to whether the shipowner had or had not any remedy against the defendants upon a new contract would have necessarily arisen; but it does not stop here. Sect. 71 enacts that, if such deposit be made, and the person making the same does not within fifteen days give to the warehouse owner notice in writing to retain it (stating in such notice the sum, if any, which he admits to be payable to the shipowner, or, as the case may be, that he does not admit any sum to be payable), the warehouse owner may, at the expiration of fifteen days, pay the deposit over to the shipowner. Sect. 72 provides for the case where the deposit has been made and the notice is given by the person who made the deposit. The warehouse owner is then to immediately apprize the shipowner of such notice and pay to him, out of the sum deposited the sum, if any, admitted to be payable to him, and retain the remainder; or, if no sum is admitted to be payable, then the warehouse owner is to retain the whole sum deposited for thirty days from the date of the notice; and at the expiration of such days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods (which includes, as before pointed out, the agent for the goods-owner who has made the deposit) to recover the sum not admitted to be due, or otherwise for the settlement of any disputes which may have arisen between them concerning the freight, the warehouse owner is to pay back to the goods-owner or the agent, as the case may be, the sum about which the controversy had arisen. It will be noticed that the words of s. 72 are: "Unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover" what is alleged to be due—that looks to me like an action at law—"or otherwise for the settlement of any dispute which may have arisen between them concerning such freight or other charges as aforesaid"—that is, the charges which are referred to in s. 68, and are such for which the shipowner had a lien.

In my judgment, the effect of the legislation is that a consignee who makes deposit, gives the prescribed notice, and takes

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delivery of the goods ex warehouse, is placed in precisely the same position as regards being sued in an action at law as a consignee who takes delivery of the goods ex ship, or of a consignee to whom the property in the goods has passed, and who takes delivery of them either ex ship or ex warehouse; and I can find no indication in the statute of making any distinction as regards liability for freight between different sorts of consignees who become receivers of cargo. On the contrary, in my judgment, the provision in s. 72, which enacts that legal proceedings may be taken against the person who makes the deposit, was expressly inserted in order that there should be no distinction. In my opinion, the deposit by the consignee is to be made for the purpose of enabling him to obtain the goods with quick despatch, and is not, as is suggested by the defendants, for the purpose of freeing him from all liability relating to freight to be paid for their carriage.

I cannot myself doubt that the legal proceedings mentioned in s. 72 include, at any rate, actions at law. Whether they also include a suit in the old Court of Chancery (for in 1862, if proceedings in equity were taken, they must have been in that Court) against the consignee in the nature of a bill filed by a mortgagee to establish his security and take the accounts, to which the warehouse owner would have had to be a party, I need not, as it seems to me, determine, though possibly it might have been open to a shipowner to have taken that course if he had been so advised.

The Act of 1862 was passed at a time when the procedure of the Courts of Common Law and the Court of Chancery was wholly distinct; and I would point out that, although actions at common law for freight against receivers of cargo ex warehouse have been of constant occurrence, I do not myself know of a bill filed in the Court of Chancery for that purpose—which must have been the case if these proceedings were resorted to prior to 1873.

Upon judgment being given in a common law action in cases where deposit of freight has been made, the practice has been, when the matter in dispute has been determined, to order the deposit money to be paid out to whomsoever it has been found by the result of the action to belong.

In my judgment, for the reasons I have stated, the plaintiffs have a right of action at law against the defendants personally, and the point they now take is not sustainable, and Day, J., was right in the conclusion at which he has arrived.

Mr. Channell, in his able argument for the defendants, then took the point that the writ in the action was issued too soon, and that it should not have been issued till after the defendants had given the second notice, which they did to the warehouse owner on December 14—not a very worthy point considering what it was the parties desired to have settled in a superior Court upon a 15*s.* dispute; and I have satisfaction in thinking that it is not well-founded.

Mr. Channell argued that the notice of December 12, 1892, by the defendants to the warehouse owner was not a notice as required by s. 71 of the Act, and that no action could be maintained until the goods-owner had stated how much he admitted and how much he disputed of the freight claimed, and that this was not such a notice. In my judgment, business men might well read this notice of December 12, as, in fact, the warehouse owners did read it, viz., a notice to retain the whole of the deposit, and that the defendants admitted nothing to be then due to the plaintiffs for freight, and that the plaintiffs were therefore within their rights in issuing the writ as they did upon receipt of the communication from the warehouse owners. I should notice that up to the present moment the defendants have not admitted that their claim to the 15*s.* rebate of freight was erroneous, and it is only by means of an action that the plaintiffs can recover it. As was stated by Lord Chelmsford in *Ireland* v. *Livingston* (1), if, when construing a mercantile document which is susceptible of two meanings, the one party has bonâ fide adopted one of those meanings, and acted upon it, it is not competent for the other party afterwards to say that he intended the document to be read in the other sense of which it was equally capable. The other party should have stated in the document what he did mean in clear and unambiguous terms. In my opinion, the point about the writ having been issued two days too soon does not avail the defendants.

(1) Law Rep. 5 H. L. 395, 416.

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The real point which the parties intended to raise and have determined, and which Mr. Channell told us had for some time been mooted, was whether a receiver of cargo in the position of the defendants could be sued at all by the shipowner for freight. I am of opinion that he can, and that this appeal must be dismissed with costs.

DAVEY, L.J. In this case I have the misfortune to differ, not only from the learned judge in the Court below, but also from my learned brethren on this bench. Useless to say, that in differing from three judges of far greater experience than I have in cases of this kind, I am almost certainly wrong. But, as I have formed an opinion on the construction and effect of the Act, I feel bound to express it.

The writ in this action was issued on December 13, 1892, for the recovery from the defendants of 148*l.* 16*s.* 3*d.* for freight due from the defendants to the plaintiffs on apples per steamship *Inchulva*, the particulars of which are given. The question we have to decide is, whether the plaintiffs had a right of action against the defendants for the freight. The defendants are the consignees named in the bill of lading of the goods, but they were not the owners of the goods and had no property in them. It is admitted that they were not parties to the contract contained in the bill of lading and could not be sued upon that contract or under the provisions of the Bills of Lading Act. It was decided in *Sanders* v. *Vanzeller* (1), and is established law, that acceptance of goods under a bill of lading does not by implication of law constitute an agreement to pay freight according to the bill of lading, but such an acceptance may be evidence (stronger or weaker, according to other circumstances) of a new contract to make the payments stipulated in the bill of lading.

It is, however, conceded by the defendants that, when a consignee takes delivery from the master, a jury ought to find such a contract. The contract in such a case would be that, in consideration of the shipowner delivering the goods and thereby waiving his lien, the consignee agrees to pay (see per Parke, B.,

(1) 4 Q. B. 260.

in *Young* v. *Moller* (1)). The plaintiffs contend that such a contract ought to be implied in the present case, and of that opinion was the learned judge in the Court below; and they say alternatively that a new right of action is given by s. 72 of the Merchant Shipping Act, 1862.

What happened in the present case was this. The defendants did not make entry of the goods and were not ready to take delivery over the ship's side. On December 12 the master gave notice to the dock company to take the goods and hold them for the freight under s. 68 of the Act. On the same day the defendants handed to the dock company a cheque for 152*l.* 17*s.* 1*d.*, being the full amount of freight claimable under the bill of lading, as calculated by them, accompanied by a letter, which has been already read. This was intended to be a deposit under s. 70. It has been contended that this letter was not intended to operate as a notice to retain the whole amount under s. 71, but was merely an intimation that further instructions would be given in due course. The dock company certainly understood it as a notice to retain the whole, as shewn by their letter to the shipowners. The notice is at best ambiguous; and in accordance with the sound principle laid down by the House of Lords in *Ireland* v. *Livingston* (2) the defendants, who were the authors of it, cannot complain of it being so understood. I shall assume, for the purpose of my judgment, that it was a retainer of the whole freight, but subject to be afterwards modified or qualified by another notice. The learned judge found that the goods were delivered by noon of December 13 to the dock company and were afterwards delivered by the dock company to the defendants. The 70th section of the Act is as follows. [The Lord Justice read it, and continued :—] The effect of the deposit made by the defendants, which was in excess of the sum actually claimed, was therefore to discharge the shipowners' lien on the goods, and the plaintiffs ceased, from the time when the deposit was made and the goods delivered to the dock company, to have any further interest in or control over the goods. They had no power to interfere with the delivery of the goods to the defendants by the dock company.

(1) 5 E. & B. 755, at p. 760. (2) Law Rep. 5 H. L. 395.

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In other words, I am of opinion that, from the time of completion of the combined transactions of the deposit by the defendants and the delivery by the plaintiffs to the dock company, the plaintiffs exchanged their lien or right of retainer of the goods for an active lien or right to obtain payment out of the sum deposited; but they retained any other remedy which they had at that time for recovery of the freight. Had they at that time a right of action for the freight against the defendants, or was there any evidence of a contract by the defendants to pay the freight? I think not. I do not see any materials out of which such a contract could be implied. There was no consideration for such an implied contract. The lien was discharged by the statute; and if it be said the plaintiffs gave up their lien by delivering to the dock company to the order of the defendants, that may conceivably have been in consideration of the defendants having discharged the lien by making the deposit, but certainly was not in consideration of the defendants entering into a new contract to make themselves personally liable to pay over again.

It may be further observed that the delivery to the order of the defendants when the lien was discharged (as it was by the statute) was in pursuance and performance of the original contract between the shipper and the shipowners. The shipowners retain all their existing remedies, but they do not so far acquire any new right of action under a new contract.

But it is said that by s. 66 the expression "owner of goods" includes "every person who is for the time being entitled, either as owner or agent for the owner, to the possession of the goods, subject in the case of a lien, if any, to such lien." This is true; but it does not, of course, make the person entitled as agent liable to whatever rights of action the real owner would be liable to.

It was then contended that s. 72 gives the same right of action against every person coming within the definition of owner as the shipowner has against the owner, because (as I understand the argument) such a construction is necessary in order to work the machinery of the section. The section is an important one. The material words for the present purpose are, "at the expira-

tion of such thirty days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum or otherwise for the settlement of any disputes which may have arisen between them concerning such freight." It is said that this contemplates that legal proceedings may be instituted by the shipowner against the persons included in the expression "the owner of the goods," in which I agree; but it is further said that no effectual proceedings can be had unless you imply a right of action for the freight against (among others) the consignee, and that it would be absurd in a case like the present to relegate the shipowner to his action against the foreign or (it may be) unknown principal. If I thought this the necessary result of not holding that the shipowner has a right of action for the freight against the consignee, I might yield to the argument notwithstanding the difficulty which I feel in saying that a new right of action can be given by such words as I find in s. 72. But I do not think it is; and, curiously enough, an illustration of what seems to me to be the true answer to the argument is to be found in the amendment made by the present plaintiffs in their statement of claim.

I am of opinion that the effect of the group of clauses under consideration, and particularly s. 72, is to give the shipowner a right to be paid his freight out of the sum deposited, which, subject to such payment, belongs to the person who made the deposit. Call it what you will, it is a security to him for his freight; and I think he has the same right as any other security-holder to take legal proceedings against the person entitled to the subject-matter of the security subject to the charge to have his rights declared and the amount due to him ascertained and raised and paid out of the property charged. It will be observed that the words of the section are "legal proceedings," not only "to recover the balance or sum," but "or otherwise for the settlement of any disputes which may have arisen between them concerning such freight." These words seem to me to exactly describe such legal proceedings in the nature of a mortgagee's suit as I have mentioned above, and I have no doubt that such an action could be maintained.

Inasmuch, therefore, as it is not, in my opinion, necessary, in

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order to work the machinery of s. 72, to imply a right of action for freight against the consignee where it does not exist apart from the section, I do not think that such a right of action ought to be implied or is given by s. 72.

The plaintiffs' claim was, and is, for 148*l.* 16*s.* 3*d.* The defendants, after action brought, directed the dock company to tender a sum less than that by 15*s.* only, which was refused. On June 3, 1893, the plaintiffs amended their statement of claim by claiming a lien. No question is raised as to the propriety or regularity of this amendment; and, in my opinion, there being this dispute about 15*s.*, it was the proper course for the plaintiffs to take in order to settle the dispute which had arisen between them concerning the freight.

The result is, in my opinion, that the action as originally framed was misconceived, and down to the amendment the plaintiffs were wrong; but I think the plaintiffs, on their amended statement of claim, are entitled to a judgment for payment to them of the amount of their claim, which is now admitted, out of the fund which has been brought into Court, but not to a personal judgment against the defendants.

As the appeal will, of course, be dismissed with costs, it is unnecessary for me to say how I think the costs of the action should be borne.

Appeal dismissed.

Solicitors for appellants: *Devereux & Heiron.*

Solicitors for respondents: *Crump & Son.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

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THE GREAT WESTERN RAILWAY COMPANY *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Conveyance on Sale—Amalgamation of Railway Companies—Stamp Act, 1891 (54 & 55 *Vict. c.* 39)—*Great Western Railway Act*, 1892 (55 & 56 *Vict. c. ccxxxiii.*).

By the Great Western Railway Act, 1892, it was enacted that the undertaking of two other railway companies should be amalgamated with and form part of the undertaking of the Great Western Railway Company, the amalgamated companies being dissolved as from the date of the amalgamation. From that date the shareholders in one of the amalgamated companies were, in lieu of and exchange for their shares, to become holders of guaranteed stock of the Great Western Company in certain specified proportions, the capital of the latter company being increased by the amount necessary to give effect to such provision. In the case of the other company the consideration for the amalgamation was the payment by the Great Western Company of the principal and interest of certain outstanding debentures, the share capital of that company being already held by the Great Western Company. A copy of the Act was to be chargeable with the same stamp duty as would have been chargeable had the transaction effected by the Act been effected by an executed instrument in writing:—

Held, affirming the decision of the Queen's Bench Division, that the transaction by which the amalgamation was effected was in substance a transfer on sale, and that the copy of the Act was therefore properly chargeable as an executed instrument under the head "Conveyance or transfer on sale" in the first schedule to the Stamp Act, 1891, with ad valorem duty in respect of the value of the stock issued to the shareholders of the first, and with ad valorem duty in respect of the value of the outstanding debentures of the second, of the amalgamated companies.

APPEAL of the Great Western Railway Company from the judgment of the Queen's Bench Division (Cave and Wright, JJ.) on a case stated by the Commissioners of Inland Revenue under 54 & 55 Vict. c. 39, s. 13.

The Great Western Railway Act, 1892 (55 & 56 Vict. c. ccxxxiii.), contained recitals: (1.) that the undertakings of the Calne, the Newent, the Ross and Ledbury, and the Wellington and Severn Junction Railway Companies were under the authority of parliament leased to or worked by the Great Western Railway Company, and that the third schedule of the Act contained a statement of the particulars of the capitals issued by those

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companies; (2.) that the Great Western Railway Company had, under the authority of parliament or otherwise, subscribed for and then held the shares, debentures, and debenture stock of those companies specified in the fourth and fifth columns of that schedule, and that it was expedient that the said companies should be amalgamated with the Great Western Railway Company in the manner provided by the Act. By s. 2 of the Act, Part V. (relating to amalgamation) of the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), was, except where expressly varied, incorporated with and directed to form part of the Act. By s. 3, relating to the interpretation of terms and expressions used in the Act, it was provided that the expression "the amalgamated companies" meant and included the Calne, the Newent, the Ross and Ledbury, and the Wellington and Severn Junction Railway Companies, and that "the amalgamated undertakings" meant and included the undertakings of the amalgamated companies respectively.

By s. 32 it was provided, inter alia, as follows: "The several undertakings of the amalgamated companies shall, subject to the contracts, obligations, debts, and liabilities of those companies respectively, be amalgamated with and form part of the undertaking of the [Great Western Railway] Company, subject nevertheless to the provisions of this Act, and each such amalgamation shall take effect as on and from the first day of July, 1892, and as on and from that date the said companies are respectively hereby dissolved except for the purpose of winding-up their affairs. A Queen's printer's copy of this Act shall be chargeable with the same stamp duty as would be chargeable if the transaction effected by the Act with reference to each of the amalgamated companies were a transaction effected by an executed instrument in writing, and the copy were the instrument." By s. 34 the shares, debentures, debenture stocks, mortgages or bonds of the amalgamated companies, held by or on behalf of the Great Western Railway Company, and specified in the fourth and fifth columns of the third schedule, were declared to be cancelled from the time of amalgamation. By s. 36, as at and from the time of amalgamation the several holders of shares in the capital of the Wellington and

Severn Junction Railway Company were, in lieu of and in exchange for the shares held by them respectively, to become and be the holders of consolidated guaranteed stock of the Great Western Railway Company in certain specified proportions, and by s. 37 the capital, which immediately before the amalgamation was the capital of the Great Western Railway Company, was to be increased by the addition thereto to the extent necessary to give effect to the provisions as to the Wellington and Severn Junction Railway Company.

The third schedule to the Act contained the particulars of each of the amalgamated companies, from which it appeared that the capital of the Calne Railway Company consisted of certain debentures and shares, held by or on behalf of the Great Western Railway Company, and of other debentures to the amount of 11,600*l.*, held otherwise than by or on behalf of that company; and that the capital of the Wellington and Severn Junction Railway Company consisted of debentures held by or on behalf of the Great Western Railway Company, and of shares to the amount of 59,830*l.* not so held. The whole of the capital of the Newent and Ross and Ledbury Railway Companies was held by or on behalf of the Great Western Railway Company.

No agreement in writing had been entered into in respect of the several amalgamations, but the usual resolutions approving of the Bill had been passed by the proprietors of the several companies.

It further appeared that the only mortgages and bonds of the amalgamated companies existing at the time of the amalgamation, and not cancelled by the Act, were the above-mentioned 4 per cent. debentures of the Calne Company for 11,600*l.*, notice to pay off which had been given by the Calne Company, and which had been paid off by the Great Western Company since the amalgamation.

The Commissioners of Inland Revenue were of opinion that if the transaction effected by the Act with reference to each of the amalgamated companies were a transaction effected by an executed instrument in writing, that instrument would be chargeable (1.) in respect of the amalgamation of the Wellington and Severn Junction Railway Company, under the head

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"Conveyance or transfer on sale" in the first schedule to the Stamp Act, 1891, with ad valorem duty in respect of the value on July 1, 1892, of 59,830*l.* consolidated guaranteed stock of the Great Western Company, to be issued to the shareholders of the Wellington Company; (2.) in respect of the amalgamation of the Calne Railway Company, under the same head, with ad valorem duty in respect of the sum of 11,600*l.*, the amount of the debenture debt of that company, which constituted a charge upon its undertaking and was undertaken by the Great Western Company; (3.) in respect of the amalgamation of the Newent Railway, under the head "Conveyance or transfer of any kind not hereinbefore described" in the said first schedule, with the duty of 10*s.*; and (4.) in respect of the amalgamation of the Ross and Ledbury Railway, under the same head, with the like duty of 10*s.* The commissioners found that the value on July 1, 1892, of 59,830*l.* consolidated guaranteed stock of the Great Western Company was 96,028*l.*, and assessed upon the copy of the Act the ad valorem duties of 480*l.* 5*s.* and 58*l.*, being the ad valorem duties of 5*s.* for every 50*l.* of the two sums of 96,028*l.* and 11,600*l.* respectively, and two duties of 10*s.* each. The Great Western Company being dissatisfied with the assessment, the present case was stated. Upon the hearing of the case the Court and parties were to be at liberty to refer to the whole contents of the Great Western Railway Act, 1892, and of Part V. of the Railways Clauses Act, 1863, incorporated therewith, and the Court were to be at liberty to draw any inference of fact or law.

The questions for the opinion of the Court were: (1.) whether the copy of the Act was chargeable as an executed instrument with the duties of 480*l.* 5*s.* and 58*l.*, and 10*s.* and 10*s.*, in accordance with the assessment of the commissioners; (2.) if not, with what duty the copy was chargeable.

The arguments on the appeal were confined to the cases of the Calne and the Wellington Companies, and the judges in the Divisional Court gave judgment in favour of the commissioners. The Great Western Company appealed.

Cripps, Q.C., and *Haldane, Q.C.* (*Pember*, with them), for the

appellants. The duty has been wrongly charged as upon a conveyance or transfer on sale; there has been no sale, though there has been a statutory transfer; what has really taken place has been an amalgamation or a fusion of the subsidiary companies with the larger or amalgamating company. The Railways Clauses Act, 1863, which is incorporated with this special Act, recognises in s. 37 two classes of amalgamation, (1.) where by the special Act two or more companies are dissolved, and the members thereof respectively are united into or incorporated as a new company; (2.) where by the special Act a company or companies is or are dissolved, and the undertaking or undertakings of the dissolved company or companies is or are transferred to another existing company, with or without a change in the name of that company. The present case comes within the latter class. In such a transfer there is no contractual element; there is nothing more than a merging of the legal personæ of the minor companies in the Great Western Company, the latter being left intact, except in so far as its powers are enlarged for the purposes of the amalgamation. The case is really analogous to that of a partnership taking fresh partners into the firm, and not to the purchase of one business or undertaking by the proprietors of another. The transfer of the undertaking of one railway company to another may, of course, be carried out in such a way as to be a transfer on sale within the strict meaning of the words, as was the case in *Furness Ry. Co.* v. *Commissioners of Inland Revenue* (1); but the mere joining or amalgamation (as in the present case) of the interests of two bodies of shareholders in certain specified proportions would not require a conveyance on sale, and is not, for the purposes of the Stamp Act, to be considered as a transfer on sale. There is no consideration moving from the Great Western Company to the subsidiary companies such as would be necessary to make the transaction a transfer on sale; it is the shareholders in the latter companies, as distinct from the companies themselves, who become holders of stock in the enlarged Great Western Company.

Sir C. Russell, A.G., and *Danckwerts*, for the commissioners, were not called upon.

(1) 33 L. J. (Ex.) 173.

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LORD ESHER, M.R. I am of opinion that this appeal must be dismissed. It seems to me to be a clear case. The smaller company was possessed of property called in railway language its undertaking, with respect to which a transaction took place, which transaction was contained in a private Act of Parliament. That Act transfers to the Great Western Railway Company—there is no other word that can describe its operation—all the property of the smaller company. It does not in any way alter the Great Western Railway Company, which remains the same entity, the same corporation that it was before, neither greater nor less. The Act allows it to acquire that which was the property of the other company, and with it its powers, the transfer being effected by means of an instrument in writing—that is, the Act itself.

Now, what is the consideration which Parliament has sanctioned, and which passes from the Great Western Company in return for this transfer? The consideration is that it gives, not indeed to the other company (though this signifies not to my mind), but to all the shareholders of that other company, an equivalent value of its own shares or capital. If that transaction had taken place between private persons or private companies without an Act of Parliament, supposing that were possible, how would it be done, and what would be the substance of the transaction? It would be done by an instrument, which, as regards its legal effect, would be, in part at all events, a transfer of the property of the one company to the other for the consideration I have just described. That might or might not be in virtue of a contract of purchase and sale, but it would have precisely the same effect as if it were a conveyance, the consequence of a contract of purchase and sale. The substance of such a transaction, then, would be a transfer of property for a consideration, as if it were upon a contract of purchase and sale. Turning to the Stamp Act, the words used are "a conveyance on sale." Does that expression mean a conveyance where there is a definite contract of purchase and sale preceding it? Is that the way to construe the Stamp Act, or does it mean a conveyance the same as if it were upon a contract of purchase and sale? The latter seems to me to be the meaning of the phrase as there used. The

nature of the transaction being in substance what I have indicated, it comes within that interpretation of the language of the Stamp Act, and the decision of the Divisional Court was therefore perfectly correct, and should be affirmed.

LOPES, L.J. I am of the same opinion. It is an established rule in cases under the Stamp Acts that the substance of the transaction is alone to be looked at in determining the question whether an instrument is liable to stamp duty. It appears to me that, looking at the substance of this transaction, it is as clear a case of a conveyance on sale as can well be imagined. As was pointed out by Cave, J., in the Court below, there is everything here that constitutes a sale—two parties, one parting with something and the other giving something for it, the arrangement ultimately come to being embodied in an Act of Parliament. The best, if not the only, point that was made on behalf of the appellants seemed to be that the consideration, instead of passing to the smaller company, passed to the shareholders of that company. I fail to see, however, that that can make any material difference, or make that which on the face of it is so apparently a conveyance on sale anything else than a conveyance on sale.

KAY, L.J. I entirely agree. The Stamp Act provides in the schedule for certain ad valorem duties payable on the conveyance or transfer on sale of any property except stock, and by s. 54 the expression "conveyance on sale" includes every instrument whereby any property or any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf, or by his direction.

The Great Western Railway Company under the powers of a special Act of Parliament has obtained all the property and undertaking of certain other companies, the enabling power being contained in s. 32. [The Lord Justice read the section.]

Now the powers of the General Act of 1863 (26 & 27 Vict. c. 92) are incorporated in that special Act, and s. 37, which is in a group of sections headed "Amalgamation," provides that companies are to be deemed amalgamated by a special Act in either of the following cases: (1.) "Where by the special Act

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two or more companies are dissolved, and the members thereof respectively are united into and incorporated as a new company" (that did not occur in this case); and (2.) (which is the part which applies to the present case), "Where by the special Act a company or companies is or are dissolved and the undertaking or undertakings of the dissolved company or companies is or are transferred to another existing company with or without a change in the name of that company." That is exactly what was done here by the special Act: the property and undertaking of the dissolved companies were transferred to and vested in the Great Western Railway Company, and without change in the name of that company. The argument for the appellants, if I have correctly appreciated it, seems to me entirely to turn upon the meaning and effect of the word "amalgamation." It is said that the true effect of this arrangement was that there was a combination of the two companies; but the difficulty that suggests itself at once is, how there can be a combination of two companies one of which is dissolved? That is impossible. Then it is said again that, admitting that there cannot be a combination of the two corporations, yet the Great Western Company, as the consideration for this so-called amalgamation, issued stock in certain proportions to the shareholders of the dissolved company, and thereby took them into its company: the effect of this, it is said, was to make an amalgamation between the two companies, and therefore the transaction was not a transfer as on a sale. The attempted analogy was this: that if two partners carrying on the same kind of business were united, and all their business and property thrown into one, that would not be a transfer as on sale. When such a view of the case is presented to us, we must try to test it by putting various instances. Suppose in this case that instead of shares the consideration for the transfer or so-called amalgamation had been cash, and that the cash had been handed direct to the company before it was dissolved, for the purpose of division amongst its shareholders; would that be a sale or not? It seems to me impossible to deny that it would, although the counsel for the appellant very properly refuse to admit it. I cannot, however, understand what a sale means if

such a transaction would not be a conveyance as on a sale. And we must remember that the Stamp Act has nothing to do with contracts or negotiations; it stamps a conveyance upon a sale, which is the instrument by which the property is transferred upon a sale. In such a case, therefore, it seems to me impossible to doubt that the transfer would be a transfer upon a sale. Then put the case where, instead of such a roundabout proceeding, the cash is paid direct to the shareholders of the dissolved company, and not paid to the dissolved company to distribute amongst its shareholders; what is the substantial difference? I can see none. Then take the case (which is this case a little altered) of handing to the dissolved company stock in the company which is taking it over for the purpose of distribution amongst its shareholders; would not that be a sale and purchase? Of course it is denied; but I cannot see why it is not. Here all that has been done is, instead of handing that stock to the dissolved company to be by it distributed amongst its shareholders the stock goes straight to the shareholders of the dissolved company. Substantially, as it seems to me, it is a purchase and sale of the property and undertaking, the business, the powers, and everything that is involved in the word "undertaking" of the company which is to be dissolved. The transfer is effected by this Act of Parliament, and this Act of Parliament is to receive the same stamp which an instrument carrying out that arrangement would have been subject to if the companies had had power to do it without an Act of Parliament. Supposing this could have been done without an Act of Parliament, the one company would by deed of conveyance have conveyed the whole of its property to the other company, the latter paying as a consideration the money's worth in stock which it had practically handed over to the former company. The reason why that has been treated as the consideration and the only consideration is that all the debenture stock and debts of the companies transferring belonged to the Great Western Company already; so that all that the Great Western Company had to buy was practically an equity of redemption—something subject to that debt. The ad valorem duty has not been computed on the debt, but has been computed on the price which the company

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has paid for what I, by way of analogy, call the equity of redemption which it had to buy. That seems to me perfectly right, and I think the judgment appealed against should be affirmed.

LORD ESHER, M.R. I ought to have said that we cannot distinguish this case from the case of *Furness Ry. Co.* v. *Commissioners of Inland Revenue.* (1)

Appeal dismissed.

Solicitor for appellants: *R. R. Nelson.*

Solicitor for respondents: *Solicitor to Inland Revenue.*

W. J. B.

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[IN THE COURT OF APPEAL.]

JOHN FOSTER & SONS, LIMITED *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Conveyance on Sale—Conveyance by Eight Partners to a Company consisting only of Themselves—Consideration—Ad Valorem Stamp—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *ss.* 70, 71.

By deed between the eight partners composing a firm of the first eight parts, and a limited company of the ninth part, it was recited that the partners were desirous that their business should be reconstructed as a limited company, and had agreed that the whole of the undertaking, property, and liabilities of the firm should be transferred to a company, to be formed of all the partners in the firm exclusively, for the purpose of taking over the same; and that there should be allotted amongst the partners, in proportion to their shares in the partnership, the whole of the shares in the company. The deed then recited that such a company had been registered (being that party to the deed), and that all its shares were taken and held by the partners in specified proportions; and it was thereby witnessed that, "in pursuance of the said arrangement, and for the purpose of giving effect to the said scheme, and of vesting the real estate of the partnership in the company," the eight partners conveyed and assigned to the company all the real estate and trade-marks of the partnership:—

Held, that the deed was a transfer of property from individuals to a corporation in consideration of "stocks or securities" within the meaning of s. 71 of the Stamp Act, 1870 (33 & 34 Vict. c. 97; see now 54 & 55 Vict. c. 39, s. 55), and accordingly was a "conveyance on sale" chargeable with an ad valorem duty within the schedule to the Act; and was none the less so because the eight partners who conveyed the property were also the individuals who constituted the corporation.

CASE stated by the Commissioners of Inland Revenue under the Stamp Act 1891 (54 & 55 Vict. c. 39), s. 13.

(1) 33 L. J. (Ex.) 173.

In 1891, eight persons, named Foster, respectively agreed to convert into a limited company the partnership in which they had for many years carried on business as merchants and manufacturers and land and colliery proprietors at Queensbury, in the county of York. On October 30 in that year they subscribed a memorandum and articles of association of the intended company, whereby the objects of the company were stated to be (inter alia) "to acquire and take over as a going concern, and carry on, the undertaking and business as spinners and manufacturers, merchants and bankers, heretofore carried on at Queensbury and Bradford, in the county of York, and elsewhere, under the style of John Foster & Son, and the mills, factories, warehouses and other buildings, works, houses, lands, mines, minerals, and all or any other of the assets and liabilities of the proprietors of that undertaking and business in connection therewith."

With respect to capital the memorandum of association provided as follows:—

"The capital of the company is 360,000*l.* divided into 21,000 preference shares of 10*l.* each, and 15,000 ordinary shares of 10*l.* each; the said preference shares shall carry a fixed non-cumulative preferential dividend at the rate of 5*l.* per centum per annum on the capital paid up thereon, and shall rank as regards capital in priority to the other shares, and the company shall have power to issue any further shares created upon any increase of capital, with any preferential, deferred or special rights, privileges or conditions attached thereto, but the preferential rights hereby assigned to the said 21,000 preference shares shall not be infringed."

The 3rd article of association provided as follows: "The company is to be entitled, as from the 1st day of January, 1891, to the business heretofore carried on by the founders at Queensbury and elsewhere under the firm or name of John Foster & Son, and all the assets of such business including the fee simple of the freeholds in the occupation of the founders as joint tenants or tenants in common; and the company *in exchange and substitution therefor* is to issue to the founders 15,000 fully paid-up ordinary shares and 21,000 fully paid-up preference

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shares in the capital of the company, and 240,000*l.* in debenture stock of the company as follows:—

Name.	Ordinary Shares.	Preference Shares.	Debenture Stock.
			£
Abraham Briggs Foster . . .	2250	3150	36,000
John Foster	2250	3150	36,000
William Henry Foster	2500	3500	40,000
Robert John Foster	2500	3500	40,000
Frederic Charles Foster . . .	2500	3500	40,000
Herbert Anderton Foster . . .	2500	3500	40,000
Philip Staveley Foster	250	350	4000
John Kenneth Foster	250	350	4000
	15,000	21,000	240,000

"And the company is to undertake all the debts and liabilities of the founders in connection with the said business. Before any of the said shares are issued a proper contract in writing is to be filed with the registrar of joint stock companies."

The whole of the capital and debenture stock was thus apportioned amongst the partners, in exact proportion to their respective agreed shares in the partnership; but by the memorandum and by the 46th and following articles, provision was made for the creation and issue of new shares either to the original shareholders or the public.

The company was incorporated on November 11. On November 27 a deed, made between the eight Messrs. Foster of the first eight parts, and John Foster and Sons, Limited, of the ninth part, was duly executed. This deed recited (inter alia) that the eight partners were desirous that their firm should be reconstructed as a limited company, and had agreed and resolved that the whole of the undertaking, property, and liabilities of the firm should be transferred to a company, to be formed of all the partners in the firm exclusively for the purpose of taking over the same (being the company party thereto), and that there should be allotted amongst the partners, in proportion to their shares in the partnership, the whole of the shares in the company, which were of the nominal value of 150,000*l.* in ordinary, and 210,000*l.* in preference shares, and all the debentures or deben-

ture stock of the company, which was of the nominal value of 240,000*l.* The deed then recited that for the purpose of carrying the said desire into effect a limited company had recently been formed and registered under the title of "John Foster and Sons, Limited" (being the company party thereto) having a capital of 360,000*l.* in preference and ordinary shares, "all of which, as also 240,000*l.* debenture stock which comprises the total capital or property of the said company, are taken and held by the said partners parties hereto of the first eight parts in the following shares and proportions, it being their intention to continue to carry on business and retain and manage the property of the said firm under the powers of the Companies Acts in lieu of their private partnership arrangements." The deed then specified the precise proportions in which the ordinary and preference shares and the debenture stock of the company were apportioned amongst the partners parties thereto, and then followed the operative part, which, so far as material, was as follows: "Now this indenture witnesseth that in pursuance of the said arrangement and for the purpose of giving effect to the said scheme and of vesting the real estate of the partnership in the said company," the eight parties of the first eight parts conveyed and assigned to the company all the real and leasehold estate and trade-marks of the partnership. No separate or other consideration was stated in the deed.

The question with what stamp duty this instrument was chargeable then arose, and was submitted by the appellants for the opinion of the Commissioners of Inland Revenue, who were informed that the value of the property conveyed thereby was, according to the books of the partnership, the sum of 140,000*l.*

The commissioners were of opinion that the instrument was a conveyance or transfer on sale, and was chargeable under the head "conveyance or transfer on sale" in the schedule to the Stamp Act, 1870, with the duty of 700*l.* at the least, being the ad valorem duty of 5*s.* for every 50*l.* of the sum of 140,000*l.*, and also by reference to s. 8 of the same Act and the schedule thereto with the duty of 10*s.*, as a deed of any kind whatsoever not described in the schedule, in respect of the other matter contained in the instrument. The duty was assessed and

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the instrument stamped in accordance with this opinion, and this case was stated to raise the question whether the instrument was chargeable with the duties of 700*l.* and 10*s.*, and if not, with what duty the instrument was chargeable. (1)

The case came on and was heard before a Divisional Court consisting of Cave and Wright, JJ., on July 17 and 18, 1893.

Finlay, Q.C., and *A. R. Kirby*, for the company.
Sir Charles Russell, A.G., and *Danckwerts*, for the Crown.

Cur. adv. vult.

1893. Aug. 12. WRIGHT, J., after stating the facts of the case, continued. The effect of the arrangement embodied in the several instruments executed by the Messrs. Foster was that the eight persons interested in a business and property as joint tenants without survivorship, or as tenants in common (whichever expression is the more correct), transferred the business and property to the company in consideration of shares and debenture stock of the company in proportion to their respective interests; and the question is whether the conveyance of the real estate and trade-marks to the company, taken in connection with the other instruments, was "a conveyance or transfer on sale of property" within the meaning of the Stamp Act, 1870.

There is no doubt that the subject-matter was "property." There is no doubt that it was transferred from the eight Messrs. Foster to the company. It was so transferred by a deed giving effect to a contract. The contract was that the company should get the property from Messrs. Foster in exchange for shares and stock of the company, the stock being of the nature, not of a

(1) The material sections of the Stamp Act, 1870 (see now 54 & 55 Vict. c. 39, ss. 54, 55), are as follows:—

Sect. 70: "The term 'conveyance on sale' includes every instrument, and every decree or order of any Court, or of any commissioners whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction."

Sect. 71: "Where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security, such conveyance is to be charged with ad valorem duty in respect of the value of such stock or security."

Sect. 78 imposes a stamp duty on conveyances "not otherwise charged."

mere right to share in profits, but of a right to an annuity secured upon the business of the company.

Every element technically necessary to constitute a sale seems to me to be present. There was a succession or transfer effected by contract for a monetary consideration; and where this is the case, all the legal elements of a sale appear to be present.

On the other hand, it is argued that the real substance of the transaction must be regarded, and that in substance this was a mere rearrangement of the title to existing interests, without any alteration of those interests—a mere change in the legal status of the persons in relation to the property, as distinguished from a real transfer of the property from one owner to a different owner; and I agree that there is much force in the contention. Possibly it ought to prevail in cases where the circumstances are such, as in some cases of reconstruction of companies, that the transaction is no more in substance than a mere change of name or alteration in the arrangement or division of capital. But, in the present case, there is much more than this. Not only was the company on November 27 an existing legal person distinct from the partners, but by virtue of the power to issue fresh capital to the public it was a legal person of a public character, having rights limiting, and in some respects adverse to, the rights of the partners and original shareholders. They could not, as the shareholders of the company, in general meeting or otherwise, issue to themselves capital fully paid up without actual payment or its equivalent, so as to prevent the future holders of shares which may be hereafter issued to the public from requiring any shares, so issued as fully paid, to be actually paid. (See the cases collected in *In re British Seamless Paper Box Co.* (1)) The rights of creditors against the company are different from the rights of creditors against the partnership. The rights of the Messrs. Foster inter se as shareholders, and between them and the company, are different, as respects set-off and otherwise, from their rights inter se as partners. In short, I think that there has been in substance as well as in law that which is a sale, and that the instrument was chargeable with duty accordingly.

(1) 17 Ch. D. 467.

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No question was raised as to the amount of the duty charged; and although the commissioners appear to have charged it upon the value of the property conveyed, instead of charging it according to s. 71, sub-s. 1, on the value of the stock or security which formed the consideration, it does not seem that any injustice has been done in this respect.

The separate duty of 10s. appears to me to have been rightly charged in addition to the ad valorem duty. Besides its operation as a conveyance, the deed contains recitals which operate by way of estoppel, as evidence of the further terms of the arrangement between the parties.

No question is raised by this case as to the assignment of the goodwill and assets by the partners, or as to that larger part of the shares and stock of the company which was appropriated to the partners in respect of such goodwill and assets. It may be that the answer to be given to such a question might depend on different considerations, and I express no opinion upon it.

I am, therefore, of opinion that the appeal should be dismissed; but, as my brother Cave takes the contrary view, I withdraw my judgment.

CAVE, J. I have the misfortune to differ from my learned brother in the view I take of the facts. The question in this case is whether the deed executed by the members of the firm of Foster & Co. on November 27 is a conveyance or transfer on sale within the meaning of the schedule to the Stamp Act of 1870. Sect. 70 of that Act provides, that for the purposes of the Act the expression "conveyance on sale" includes "every instrument and every decree or order of any Court, or of any commissioners whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser, or any other person on his behalf or by his direction." Now, it is admitted on all hands that the deed in question did transfer to and vest in the company of Foster & Co., Limited, the property which up to that time had belonged to the partners in the common law partnership of Foster & Co., and the question is whether this was done "upon a sale thereof."

To constitute a sale it is essential that there should be a seller,

a purchaser, a thing sold, and a price given for the same; and the interests of the purchaser and seller are necessarily distinct and antagonistic. If any of these characters are wanting, the transaction may be a mortgage, or a gift, or an exchange, or a partition, or a transaction of some other kind; but it cannot be a sale.

Now, I cannot agree that all the elements of a sale exist in this case. To my mind, it is impossible to say that the partners were the sellers and the company the purchasers. There was no bargain between the so-called sellers and purchasers. The agreement which was made was made between themselves, and not with the company, which was merely formed to carry out an arrangement made by the partners inter se. The partners did not sell their property to the company, nor were the company the purchasers. They had no antagonistic interests. There was no price agreed on between them. The number and distribution of the shares in the company were arranged by the partners without the intervention of the company. No consideration is mentioned in the instrument, and it was quite immaterial to the company, the alleged purchasers, what was the number or distribution of shares in the company which are alleged to have been the consideration for the alleged sale.

The only persons who had any real interest in the transaction were the partners, the alleged sellers, and their interests instead of being the same were, so far as the distribution of the shares was concerned, antagonistic, but antagonistic inter se, not in any way antagonistic to the company.

Could it be said that when a company is wound up, and the assets are distributed among the shareholders in proportion to their shares, that there is a sale of the assets by the company to the individual shareholders? It is not enough to say that there are some features resembling those of a sale in the transaction. In an exchange of real property there are some such features, yet no ad valorem duty is payable on such an exchange, except upon any consideration exceeding in value or amount 100*l.*, which may be paid or given for equality. So is the law with respect to partition or division. The object here is not to sell the assets of the partnership for money or money's worth, but

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simply to turn the partnership into a company, and in pursuance of that object to transfer the assets of the partnership to the company without altering the value of the interest in the assets possessed by each individual member of the partnership. If one of the original partners had retired for a money consideration, there would obviously have been a sale by the outgoing partner to the remaining partners, or, if the company had been formed of persons distinct wholly or in part from the original partners, there might have been a sale by the original partners to the persons composing the new company. The case is much the same when two joint tenants of an estate agree to convey it to A. to the use of themselves as tenants in common. There are not here so many of the features of a sale as where two persons owning different estates agree to exchange them, or two co-parceners agree to divide their inheritance. The commissioners themselves appear to have felt a difficulty, for they have not taken the value of the shares of the new company as the value of the consideration for the sale; yet unless these shares are stock within s. 71, sub-s. 1, there is no consideration which admits of the valuation prescribed in the schedule for fixing the amount of the duty, as these shares are certainly not "money" nor "securities for money," and it is only in favour of stock or securities for money that the common law requirement that the consideration for a sale must be money is dispensed with by the statute. Even if the transaction is an exchange of assets of the company for the assets of the partnership, so that it is immaterial whether the value of one or the other is taken, that is not a sale, but at most an exchange which is not within the meaning of the words "conveyance on sale." In short, whatever fanciful resemblances to a sale the subtle eye of a lawyer may detect, no man of business would call this transaction a sale, and as no other duty has been suggested, I am of opinion that the stamp of 10*s.* required in a conveyance or transfer of any kind not thereinbefore described is all that can be demanded.

A. P. P. K.

The commissioners appealed; and the appeal was heard on December 11, 1893.

Sir Charles Russell, A.G., Sir John Rigby, S.G., and *Danckwerts*, for the appellants. The stamp duty payable in respect of the document of November 27 has been rightly assessed. That document is admitted to be a conveyance or transfer, and the only question is whether it is a conveyance or transfer "on sale." The contention of the respondents is that the transaction was a mere redistribution of property, because the persons who were the owners of the private concern are the same persons as those who constitute the company. But this is a fallacy. They are different entities altogether, with different incidents of ownership. If, then, the conveyance was a conveyance for consideration, it is a conveyance "on sale." It is not correct to say that "no consideration is mentioned in the instrument." The conveyance purports to be made "in pursuance of the said agreement, and for the purpose of giving effect to the said scheme and of vesting the real estate of the partnership in the said company." The consideration is, therefore, that the new company shall allot to the eight individuals, who were the partners in the original firm, the ordinary and preference shares and debenture stock of the company in proportion to the amount of their shares in the original business. The commissioners, having perhaps a difficulty in ascertaining the real value of the shares and stocks, have charged the ad valorem duty upon 140,000*l.*, as being the value of the property which passed by the deed, instead of the value of the stock and shares; but nothing turns upon this, as the real question is whether any ad valorem duty at all is payable.

The moment the conveyance was executed the individual partners in the private firm, each of whom had up to then an unlimited liability, ceased to have any property in the old business, and became interested in a fresh concern, as shareholders in a public corporation with limited liability, with the power of raising further capital, and of selling and disposing of their shares, and introducing new members into the concern.

[They referred to *Great Western Ry. Co.* v. *Commissioners of Inland Revenue* (1); *Prescott, Dimsdale & Co.* v. *Bank of*

(1) Ante, p. 507.

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England (1); *In re Eddystone Marine Insurance Co.* (2), and were then stopped by the Court.]

Finlay, Q.C., and *A. R. Kirby*, for the respondents. This transaction was not a sale, in any substantial or business-like sense of the term; and this instrument was not a conveyance or transfer "on sale." A conveyance on sale is a conveyance giving effect to or carrying out a sale. A sale cannot take place without two parties capable of contracting the one with the other, of whom the one has the property to be sold, and the other the consideration to be given for it. Here this corporation could not, when this transaction took place, contract except through the agency or instrumentality of the persons forming the corporation; so that the so-called vendors and purchasers were identical. Every sale must be based upon some kind of contract or bargain, and here there was no contract with the company quâ company. The several partners merely agreed and resolved amongst themselves. The company was a mere paper company, and had nothing whatever to transfer. In order to bring the case within this enactment as to ad valorem duty there must be some consideration moving from the vendee to the vendor, irrespective of the property conveyed. These shares and debentures were in themselves absolutely worthless, except so far as they derived a value from the conveyance of the property comprised in the deed. So that the same property which was conveyed by the vendors came back to the vendors from the so-called vendees in another form. The element of consideration is, apart from the property conveyed, entirely wanting, and the case stands upon the same footing as if the property had been conveyed to a trustee for the purpose of distribution between the parties. This was, in fact, a redistribution of property. In the case of *Great Western Ry. Co.* v. *Commissioners of Inland Revenue* (3), an amalgamation between two existing companies was carried out by one company transferring to the others all its undertaking and property in consideration of the handing over of a number of shares and debentures of the other company to the shareholders of the

(1) Ante, p. 351. (2) [1893] 3 Ch. 9.

(3) Ante, p. 507.

transferring company. In that case these companies tried to escape payment of duty, upon the ground that the transaction was an amalgamation and not a sale. It was there decided that the transaction was a sale, but that decision is not in conflict with our argument, because the ratio decidendi was that the Great Western Railway had something to part with, and the other company had something to give.

No reply was called for.

LINDLEY, L.J. I confess that, with great deference to Cave, J., I cannot see the difficulty in this case.

The material sections of the Act of 1870 must first be considered. [The Lord Justice then read ss. 70 and 71 of the Stamp Act, 1870, and continued :—] The importance of s. 71, to my mind, is this: It shews that there may be a conveyance on sale, although the consideration for it is not cash or money, but may include or consist of stock or marketable securities. The definition of "stock" and "marketable securities" will be found in s. 2. Then s. 78 imposes a stamp duty on conveyances not otherwise charged, and the schedule shews what the stamps are that are imposed upon conveyances that are charged. First we have "conveyance or transfer whether on sale or otherwise," of certain stocks and dividends. The present case does not come within that head. Then we have "conveyance or transfer on sale, of any property" . . . . "where the amount or value of the consideration for the sale does not exceed 5*l*." That fits in with ss. 70 and 71. Then we come to: "Conveyance or transfer by way of security of any property or of any security"; and then we have "Conveyance or transfer of any kind not hereinbefore described." We must accordingly consider under which of these heads the particular deed in this case comes. It certainly does not come under the first, nor under "conveyance or transfer by way of security of any property," and the alternative is between "conveyance or transfer on sale" and "conveyance or transfer of any kind not hereinbefore described."

Now, the document in this case is an indenture made between eight gentlemen of the first eight parts, and "John Foster & Sons, Limited (hereinafter called 'the company') of the 9th

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part." Pausing there for a moment: although the persons of the first eight parts may be, and were members, and the only members, of John Foster & Co., Limited, John Foster & Co., Limited, is not those eight individuals; John Foster & Co., Limited, is a corporation. We have accordingly two parties, one party consisting of several individuals, and the other party consisting of a corporation. Whether they are or are not the members, or the only members of the corporation, is wholly immaterial. The corporation is a totally different person from them in any capacity you choose to assign to them except a corporate one. [The Lord Justice then stated the recitals in and the operative part of the conveyances, and continued:—]

Then the parties of the first eight parts put their seals to the instrument, and the company puts its seal to it. Now, what is that instrument? It is certainly a conveyance of property—that is obvious. In order to amount to a conveyance of property there must be a person conveying and a person taking, and you have them both here. The persons conveying are the persons named in the first eight parts, and the persons taking are the corporation named in the ninth part.

Now, what is the consideration? The consideration for the transfer of this property is, I agree, not money, but it is stocks and securities, which for this purpose are to be regarded as equivalent to money by reason of s. 71 of the Act to which I have already alluded. Then what have we got? To sum it up shortly, it is a conveyance of property from one person to another, for money, or what is, according to the provisions of the statute, equivalent to money. What is that except a conveyance on sale? What else can you call it? It is certainly not a gift; it is not an exchange; it is not a partition; it is not a mortgage. I do not know what it is unless it is a conveyance on sale. I do not know what is necessary to constitute a sale, except a transfer of property from one person to another for money, or for the purposes of the Stamp Act, for stock or marketable securities.

But then it is argued that it is only a redistribution of property. I do not consider it a redistribution at all. It is an entire transfer of property from one set of people to another

person altogether, and whether there are, as there may well be hereafter, additional persons taking shares in this company, is perfectly immaterial.

Again it is argued on behalf of the appellants that this instrument is in substance nothing more than a conveyance to a trustee to carry on the business in trust for the grantor. Just try that. Supposing there is a conveyance by half-a-dozen people, transferring their property to a trustee on trust to carry on the business for them, can you in any sense of the word, legal or business-like, or otherwise, call that trustee a buyer? There is no buying, there is no sale to him at all, nor is there any money, or stock, or securities, or anything else parted with by him. Then it was urged that these shares can derive no value unless the company gets this property transferred to them. That is possible enough. That is to say, in other words, that the shares in the company would be valueless unless the company had assets. Of course they would be, but that does not affect the question whether there is a sale or a conveyance or not. I think myself that Cave, J., has attached too little importance to the fact that you have here a distinct seller, and a distinct buyer, and that in point of law it is immaterial that in the present case the buyer is a corporation which consists of the eight persons who formed, and who are, the partners. The appeal must be allowed.

KAY, L.J. I am of the same opinion. With deference to Cave, J., it seems to me impossible to hold that this transaction was anything else than a conveyance on sale. As pointed out on the face of the statute, the consideration may be money or money's worth. Money's worth certainly is sufficiently expressed by a number of shares and debentures of an existing corporation, which, in effect, constituted the consideration for the particular transfer in this case. Now, that there was a conveyance is beyond all question. The persons who are named as vendors in the deed have divested themselves of their property in the subject of that conveyance, and all that property is vested in an entirely independent and separate body—namely, a corporation. Suppose that corporation had consisted of altogether different persons, no

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one for a moment would doubt that this was a conveyance on sale. Suppose there had been one person in it different, there is nothing that I have heard in the argument which induces me to suppose that even in that case it could have been doubted that this was a conveyance on sale. But the argument, as I understand it, is this—that the individual corporators who composed that corporation were, in fact, the very identical persons who were conveying this property to the corporation, and the corporation had no other property except this which it took under its conveyance; and that, as the only value of the shares and debentures was derived from this very property which the individual corporators were conveying to the corporation, the conveying partners either got no consideration for that which they conveyed other than part of the property actually conveyed, or they got no consideration at all. Now, I do not follow that argument in the least. I think it is a fallacy from beginning to end. In the first place, a corporation is a different thing from the individuals who compose it; and, secondly, the shares and debentures of a corporation are not the same thing as the property which that corporation owns. You may say, in one sense, that the property is a security for the value of those shares. The value of those shares in the market, which observe are immediately transferrable, may depend upon the solvency of the company, the amount of property it possesses, and its chance of carrying on a profitable business. To say that the shares and debentures are part of that property seems to me to be a complete confusion of terms. Suppose the case, which I put during the argument, of a sale of real estate, and the whole of the purchase-money not to be paid at once in cash, but to be secured on mortgage on that real estate; and, if you like, in order to make the analogy perfect, suppose the purchaser had no other property than that property, would the transaction be the less a sale for that reason? Still the consideration given would be a certain amount of cash which would be left on the security of the estate; but I have never yet heard that because the whole of the purchase-money upon a sale of real estate was left on mortgage of the real estate, that for that reason the transaction ceased to be, or was prevented from being, a sale. Yet, really, that is what the argument in this case comes to. I

confess I am not able to agree with it. Nothing else was suggested which should prevent this transaction from being a sale, and it seems to me clearly to be, under the words of this statute, "a conveyance on sale" for a consideration, which, if not money, at least is money's worth. I, therefore, with all deference to Cave, J., think that his decision must be reversed, and the appeal allowed.

A. L. SMITH, L.J. The question in this case is whether the instrument of November 27, 1891, is a conveyance or transfer on sale of any of the property mentioned under the second head—"conveyance or transfer"—in the schedule to the Stamp Act of 1870.

Now, in order to find out what is, or is not, a conveyance or transfer on sale of any property in that second head of the schedule, I must refer to ss. 70 and 71 of the Act. And, reading both these sections together, it seems to me that the term "conveyance on sale" includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser in consideration of any stock or marketable security. That is the definition.

First of all, then, is this an instrument whereby any property is transferred to or vested in the purchaser? I beg to say, Yes. It is an instrument upon the face of which the actual land of the vendors, and the trade-marks which are their property, are transferred to a limited company. I do not think that this is disputed, and it does not appear to me to be disputed so far, in the judgment of my brother Cave; but what he says is that this is not an instrument whereby any property, upon the sale thereof, is transferred. The real pith of his judgment is that the vendors and vendees are the same persons—that the agreement as regards the sale was carried out by the members of the old firm before any company limited came into existence, and that inasmuch as they are the same persons now as then, there is no sale at all; and, therefore, there is no instrument whereby any property upon the sale thereof is transferred. I must here respectfully differ with my brother Cave. It seems to me that the company limited are not the same persons as the eight members of the old firm—they

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are different altogether. It was admitted by Mr. Finlay in argument, though he entirely took away the ground from under my brother Cave's feet when he said so, that the company limited could maintain a suit for specific performance against the old partners. If that is so, how can they be the same persons? This really shews that they are not the same persons. It is here that I disagree with my brother Cave.

The respondents also contend that there was no consideration. We must read the two sections together. Sect. 70 enacts that: "The term 'conveyance on sale' includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser." Then s. 71 implies that it may be in consideration of any stock or marketable security. The land and the trade-marks are transferred by this instrument from the eight partners who were the old firm to the new company limited. The land and trade-marks are transferred by this instrument in consideration of what? In consideration of stock or marketable securities, which, undoubtedly, are not the same things as the land and trade-marks themselves, though they may be charges upon the land and trade-marks which are conveyed. It seems to me that it is untrue to say that in this transaction there has been no consideration passing from the vendee to the vendor. Although charges upon the land and the trade-marks, the consideration comes within the very terms of s. 71 itself—"any stock or marketable security."

For these reasons, I prefer the judgment of my brother Wright to that of my brother Cave.

Appeal allowed.

Solicitors: *Hudson, Matthews & Co.; The Solicitor of Inland Revenue.*

W. W. K.

MUSURUS BEY *v.* GADBAN AND OTHERS. 1893 *Nov.* 22.

*Limitations, Statute of—Personal Action—International Law—Ambassador, Immunities and Privileges of—Debtor—Absence beyond Seas—Service of Writ out of the Jurisdiction—*21 *Jac.* 1, *c.* 16—4 *& 5 Anne, c.* 16, *s.* 19—7 *Anne, c.* 12, *s.* 3—*Rules of the Supreme Court,* 1883, *Order* XI.

Whilst the ambassador of a foreign State is in this country and accredited to the Sovereign, the Statute of Limitations (21 Jac. 1, c. 16) does not begin to run against his creditors.

The immunity of the ambassador of a foreign State from process in the Courts of this country extends for such a reasonable period after he has presented his letters of recall as is necessary to enable him to wind up his official business and prepare for his return to his own country, and he is not deprived of the immunity by reason that his successor is appointed before that period has elapsed. The Statute of Limitations does not begin to run against his creditors during such period.

By 4 & 5 Anne, c. 16, s. 19, where in certain specified actions a defendant is beyond the seas when the cause of action arises, the plaintiff shall be at liberty to bring his action after the defendant's return, so that he brings it, after the defendant's return, within the time limited by 21 Jac. 1, c. 16.

Order XI. of the Rules of the Supreme Court enables plaintiffs, by leave, in certain cases to serve a writ, or notice of a writ where the defendant is neither a British subject nor in British dominions, out of the jurisdiction :—

Held, that Order XI. has not the effect of annulling the right of a plaintiff, under 4 & 5 Anne, c. 16, to bring his action after the defendant's return from beyond the seas within the time limited by 21 Jac. 1, c. 16.

SPECIAL CASE stated, under an order of the Court made by consent, in an action.

The action was brought by Musurus Bey, as executor of Musurus Pacha, deceased, claiming the delivery of certain Turkish bonds in the possession of the defendants, who were the executrix and executors of Paul Gadban, deceased.

The defendants consented to judgment for the plaintiff on the claim; but they counter-claimed, as such executrix and executors, and as assignees of W. C. Watson, for a debt of about 3000*l.* for money alleged to have been advanced by Paul Gadban and W. C. Watson to Musurus Pacha.

The plaintiff replied (inter alia) that the defendants' claim was barred by the Statute of Limitations (21 Jac. 1, c. 16), and the facts stated in the special case were to be taken as admitted for the purpose of raising for the decision of the Court the question

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whether the debt for which the defendants counter-claimed was, or was not, so barred.

Those facts, so far as it is material to state them for the purposes of this report, were as follows :—

The plaintiff's testator, Musurus Pacha, was ambassador from the Sultan of Turkey to Her Majesty the Queen from 1856 until December 7, 1885, when on presentation of his letters of recall he ceased to be such ambassador, being succeeded by Rustem Pacha in the same month. During all that time he resided in England, and he incurred the liabilities in respect of which the counter-claim was brought whilst exercising his ambassadorial functions, and prior to 1876. He continued residing in England from December 7, 1885, until the month of February, 1886. On leaving England, he went to Turkey, where he resided until his death in 1890.

More than six years elapsed after December 7, 1885, and after the month of February, 1886, before the bringing of the counter-claim. No writ was ever taken out by the defendants, either against Musurus Pacha or against the plaintiff as his executor, in respect of the subject-matter of the counter-claim, nor any other proceeding taken, until the bringing of the counter-claim.

Lawson Walton, Q.C. (*G. P. Macdonell,* with him), for the defendants. The debt in respect of which the defendants have counter-claimed is not barred by the Statute of Limitations. The statute, at any rate until the death of Musurus Pacha in 1890, never began to run against the defendants. Whilst he was the ambassador of a foreign State to the Queen, no writ could be issued against him, or process served upon him. That state of things continued until he presented his letters of recall on December 7, 1885, and after that date the same protection continued until his return to his own country in February, 1886, the interval being a reasonable time to allow him to settle his own private affairs in this country, to terminate and hand over to his successor the pending official business of the embassy, and generally to arrange for his return. After he returned the statute did not begin to run, because he was out of the jurisdiction. The ground of the immunity enjoyed by an ambassador from being

sued in the Courts of the country to which he is accredited, is that he is out of the jurisdiction of those Courts. He is constructively "beyond the seas," and the doctrine of extra-territoriality prevents him from being subject to process, because in the theory of international law he is under the protection of, and responsible solely to, his own Sovereign, and it would be an affront to his Sovereign if process were issued against the ambassador in the Courts of a Sovereign to whom he owes no allegiance. The protection extends for a reasonable time until he returns to his own country. Those propositions are laid down by various writers of authority on international law, of which the following may be referred to: Vattel's Law of Nations (translated by Chitty), pp. 488, 491, 499; Bar's Private International Law (translated by Gillespie, 2nd ed.), p. 1091, s. 520; Wheaton's International Law (2nd ed. by Lawrence), p. 392. There are also authorities in the English Courts to the same effect. In *Taylor* v. *Best* (1), in an action brought against an ambassador, he appeared, pleaded, joined issue, and applied for a special jury to try the action. Afterwards he asked for a stay of proceedings on the ground of his privilege, and that application was refused, but only on the ground that he was estopped at that stage from setting up his privilege. That case, therefore, which may be relied on for the plaintiff here, is no authority that the action might have been brought against the ambassador in the first instance. The contrary was held, and the propositions above stated were affirmed, in *Magdalena Steam Navigation Co.* v. *Martin.* (2) Lord Campbell, in delivering the judgment of the Court, said (3): "The question raised by this record is, whether the public minister of a foreign State, accredited to and received by Her Majesty, having no real property in England, and having done nothing to disentitle him to the privileges generally belonging to such minister, may be sued against his will in the Courts of this country for a debt." The Court held that he could not be sued. A person is "sued" by issuing a writ against him, and whether the writ be served upon an ambassador or not, there is equally an affront to the Sovereign whom he represents.

(1) 14 C. B. 487.

(2) 2 E. & E. 94; 28 L. J. (Q.B.) (N.S.) 310.

(3) 2 E. & E. at p. 111.

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[WRIGHT, J. In *Duke of Brunswick* v. *King of Hanover* (1) no one seems to have doubted that the Chancellor could issue a writ against the King of Hanover.]

That was a peculiar case because the King of Hanover was also a British peer, and he had land within the jurisdiction. The statute 7 Anne, c. 12, s. 3, is declaratory of the common law with respect to an ambassador's immunity from process. Sect. 3 enacts "that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador . . . . or the servant of such ambassador . . . . may be arrested and imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever." That statute has the effect of annulling the writ altogether. Lord Campbell, in *Magdalena Steam Navigation Co.* v. *Martin* (2), was of this opinion, because he says (3): "The writs and processes described in the third section are not confined to such as directly touch the person or goods of an ambassador, but extend to such as, in their usual consequences, would have this effect." If no writ could be issued against the ambassador, then there was no "cause of action" within the Statute of Limitations (21 Jac. 1, c. 16), which by s. 3 makes the period of limitation begin to run from the "cause of such actions or suit." It is essential to the existence of a cause of action that there should be a person capable of suing and a person capable of being sued: *Douglas* v. *Forrest* (4), judgment of Best, C.J., at p. 704; *Flood* v. *Patterson* (5); *Boatwright* v. *Boatwright* (6); *Murray* v. *East India Co.* (7), judgment of Abbott, C.J., at pp. 214, 215; *In re Crosley, Munns* v. *Burn.* (8) This is not a case to which Order VIII., r. 1, applies (which provides for the renewal of a writ when the defendant has not been served therewith). It is not a case in which there is a good cause of action, and therefore the writ can be issued, but there is no one on whom

(1) 6 Beav. 1; 2 H. L. 1.
(2) 2 E. & E. 94; 28 L. J. (Q.B.) (N.S.) 310.
(3) 2 E. & E. at p. 114.
(4) 4 Bing. 686.
(5) 29 Beav. 295.
(6) Law Rep. 17 Eq. 71.
(7) 5 B. & A. 204.
(8) 35 Ch. D. 266.

it can be served. Here there was no power to issue the writ at all.

Before Musurus Pacha left this country he was "beyond the seas" within the meaning of 21 Jac. 1, c. 16, s. 7 (which provides that plaintiffs who are "beyond the seas," when the cause of action arises, may bring their action within the statutory period from the date of their return), and of 4 & 5 Anne, c. 16, s. 19, which provides that where a defendant is "beyond the seas" when the cause of action arises, the plaintiff "shall be at liberty" to bring his action within the statutory period from the date of the defendant's return. The technical legal sense of the expression "beyond the seas" is capable of including the case of a person constructively out of the kingdom, though physically within it: see *Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund.* (1) After Musurus Pacha left the country, the defendants clearly were under no obligation to sue in order to prevent the Statute of Limitations from barring their claim, because he was then undoubtedly beyond the seas, within 4 Anne, c. 16, s. 19. It will be contended that those provisions have been in effect repealed by Order XI., which enables a plaintiff, with the leave of the Court, to serve a notice of a writ out of the jurisdiction, where the defendant is neither a British subject nor in British dominions, and that the Statute of Limitations could have been saved by proceeding under rule 6 of that order. But it was never intended by Order XI. to cast upon creditors any new obligation with respect to the Statute of Limitations. The rules are intended to deal with procedure; the granting of leave to serve notice of a writ out of the jurisdiction is discretionary only, and the creditor is not bound to avail himself of the procedure in order to save the statute.

Pollard, for the plaintiff. The Statute of Limitations ran against the defendants whilst Musurus Pacha was still an ambassador—i.e., up to the time he presented his letters of recall. The privilege of an ambassador is personal only, protecting his person and his goods. He is capable of making a valid contract in the country in which he is ambassador. There

(1) 8 Moo. P. C. 4, at p. 20.

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was nothing to prevent the defendants, or the persons whom they represent, from issuing a writ in respect of the debt which is the subject of the counter-claim, and renewing it from time to time so as to save the statute. The point did not arise in *Magdalena Steam Navigation Co.* v. *Martin* (1), because the action was brought against the ambassador, and he appeared in person and pleaded his privilege. If Lord Campbell in that case meant to say that no writ could be issued, his dicta in that respect were obiter; but the judgment, it is submitted, tends to shew that, in the opinion of the Court, there was no breach of the privilege of an ambassador in the mere issuing of a writ. The fair result of the judgment is that an ambassador cannot be "cited and impleaded"—as by service of the writ upon him and consequent proceedings—in the Courts of the country to which he is accredited. Lord Campbell says (2): "Mr. Bovill, being driven from his supposition that the writ in this case might be sued out only to save the Statute of Limitations, by the fact that it had been served upon the defendant, and by the allegation in the plea that it was sued out for the purpose of prosecuting this action to judgment, strenuously maintained," &c. It is clear, therefore, that the question whether the statute could have been saved by merely issuing the writ, without serving it, was not intended to be dealt with. The fact that the writ had been served, and subsequent proceedings taken for the purpose of prosecuting the action to judgment, are the reasons given by Lord Campbell for holding that the plea of privilege was good. Again he says (3), in dealing with the statute 7 Anne, c. 12, which also only applies to proceedings against the person and goods of the ambassador: "The writs and processes described in the third section are not to be confined to such as directly touch the person or goods of an ambassador, but extend to such as, in their usual consequences, would have this effect. At any rate, it never was intended by this statute to abridge the immunity which the law of nations gives to ambassadors that they shall not be impleaded in the Courts of the country to

(1) 2 E. & E. 94; 28 L. J. (Q.B.) (N.S.) 310.

(2) 2 E. & E. at p. 113.

(3) 2 E. & E. at pp. 114, 115.

which they are accredited. An argument was drawn from the course pursued in some instances of setting aside bail bonds given by persons having the privilege of ambassadors, or their servants, on filing common bail. This, perhaps, is as much as could reasonably be asked on a summary application to the Court, but does not shew that the action may not be entirely stopped by a plea regularly pleaded to the jurisdiction of the Court." This reference to the proceeding of setting aside bail bonds, on a plea to the jurisdiction raising a further point, shews that Lord Campbell thought that the mere issuing of a writ, unless there is an arrest or a seizure of the goods, is not a violation of the ambassadorial privilege. That part of the judgment could not have been given if the Court intended to decide that the writ could not have been issued, though it were not served. The passage, also (1), in which Lord Campbell points out the consequences of allowing an ambassador to be impleaded shews clearly that his mind was directed only to the case of a writ issued and served and proceedings taken to prosecute the action to judgment. He says: "The trial may last many days, and his personal attendance may be necessary to instruct his legal advisers. Can all this take place without 'coactio' to the ambassador? Then, what benefit does it produce to the plaintiffs? There can be no execution upon it whilst the ambassador is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall." The last sentence is obiter. If the privilege does extend to a reasonable time after the ambassador's recall, it is only the personal privilege in respect of his person and goods specified in 7 Anne, c. 12. The judgments in *Taylor* v. *Best* (2) are also wholly inconsistent with the proposition that the mere issuing of a writ is a violation of the privilege. They establish that the privilege only exists where it is sought to compel an ambassador, "in invitum," to engage in litigation which may ultimately result in the coercion of his person, or the seizure of his personal effects; but they assume that any proceeding which does not bring about those results may be taken against him. The judgments,

(1) 2 E. & E. at p. 114.

(2) 14 C. B. 487.

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both in *Taylor* v. *Best* (1) and *Magdalena Steam Navigation Co.* v. *Martin* (2), were unnecessary if the mere issuing of a writ was a violation of the privilege. If Musurus Pacha himself had brought the action to recover these bonds, the bringing of the counter-claim could not have been a violation of the privilege, because he would have submitted himself to the jurisdiction of the Court. That proposition is established with respect to actions brought by a sovereign, than whom an ambassador has, at any rate, no higher privilege, and it is inconsistent with the theory that the mere filing of the counter-claim would be a violation of the privilege. The passages which were cited from the treatises of writers on international law have reference only to an ambassador's immunity in respect of process which will affect his person or his goods. *Douglas* v. *Forrest* (3), and the other authorities cited to establish that there must be a person capable of being sued in order to constitute a cause of action, were cases in which there never had been a defendant within the jurisdiction, and they have no application to this case. As to the doctrine of extra-territoriality, if it applies, and if the contract must be taken to have been made out of the jurisdiction, it was still to be performed within the jurisdiction, and the defendants might have issued a writ, applied for leave to serve it out of the jurisdiction, and had it renewed from time to time, because it could not be served. But there are express decisions that the expression "beyond the seas" in 21 Jac. 1, c. 16, and 4 & 5 Anne, c. 16, must be taken literally; a person to whom it applies must be physically and in fact beyond the seas: *King* v. *Walker* (4); *Strithorst* v. *Graeme.* (5)

As to the period between the time when Musurus Pacha presented his letters of recall and his return to Turkey, it is submitted that the defendants clearly could have sued him. He was in England about two months after his successor was appointed, and there cannot be two ambassadors from Turkey in this country accredited and privileged at the same time. After Musurus Pacha's return to Turkey, the defendants could have

(1) 14 C. B. 487.
(2) 2 E. & E. 94; 28 L. J. (Q.B.) (N.S.) 310.
(3) 4 Bing. 686.
(4) 1 W. Bl. 287.
(5) 2 W. Bl. 723.

obtained leave to serve a notice of a writ upon him out of the jurisdiction under Order XI., and so have saved the statute. It is submitted that the statute 4 & 5 Anne, c. 16, must be taken to have been superseded by Order XI.

Lawson Walton, Q.C., replied.

WRIGHT, J., delivered the judgment of the Court (Lawrance and Wright, JJ.). My brother Lawrance desires me to state the conclusion at which we have arrived. As to the contention of the plaintiff's counsel, that there could not be two persons at once entitled to the privilege of an ambassador, it appears to me not to be consistent with good sense, as applied to the facts of the present case, and to be inconsistent with *Marshall* v. *Critico.* (1) In that case, the person who claimed the privilege had, some months previous to his arrest, been dismissed by his Government from his appointment in this country, and his successor appointed. It was a much stronger case than this, yet no one suggested that the mere fact of there being two persons at the same time who claimed the privilege was an objection. Lord Ellenborough, in refusing to allow the privilege, did it simply on the ground that the State by whom the ambassador was accredited had dismissed him from his office, and, therefore, that he was disentitled to claim the privilege of an ambassador. The existence of the general privilege of an ambassador—namely, that he is exempted from being sued in the Courts of the country to which he is accredited—has not been seriously contested. It was said that there is no English authority for the proposition that the privilege continues until the return of the ambassador to his own country, or, at any rate, so long as he is reasonably and properly occupied in winding up the affairs of his embassy and preparing to return there. We think that there is sufficient authority in the text-books which were cited to shew that the privilege may continue in the manner which the defendant's counsel contended for; and, even if there were no authority to that effect, we should come to the same conclusion on

(1) 9 East, 447.

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principle. In *Taylor* v. *Best* (1), however, the proposition was suggested in argument, and supported by the authority of an American case, *Dupont* v. *Bichon* (2), where it was held, by the Supreme Court of Pennsylvania, that a chargé d'affaires is entitled to privilege from arrest until his return to his own country, although he has been for some months superseded by a minister plenipotentiary, the delay of the chargé d'affaires in returning to his own country being occasioned by official business. It is to be observed that in *Taylor* v. *Best* (1) the Court did not dissent from that proposition when it was suggested to them. Further, we do not think there is anything in the facts stated in the special case to rebut the presumption that the privilege continued until the return of Musurus Pacha to his own country. With regard to the important question raised as to the Statute of Limitations, it seems really to depend upon what is the proper view to take of three cases: *Douglas* v. *Forrest* (3), *Taylor* v. *Best* (1), and *Magdalena Steam Navigation Co.* v. *Martin.* (4) To some extent, the point raised to-day is new. It is this: Admitting that Musurus Pacha, whilst he retained his privilege, could not have been sued to judgment or execution, still it is said that a writ could have been issued against him for the purpose of avoiding the application of the Statute of Limitations, and, therefore, that the statute began to run whilst he was in England. We think, on the whole, that we ought to follow the indication of opinion of Lord Campbell in *Magdalena Steam Navigation Co.* v. *Martin* (4), to the effect that the statute 7 Anne, c. 12, prohibits and makes null and void the issue of any writ or process against an ambassador, and not merely writs or processes in the nature of writs of execution. We think, also, that the view taken by Best, C.J., in *Douglas* v. *Forrest* (3) is applicable. He says (at p. 704): "Cause of action is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue;" and it seems to us that, so long as the debtor is in the position that nothing can be done against his person or his

(1) 14 C. B. 487.
(2) 4 Dallas, 300.
(3) 4 Bing. 686.
(4) 2 E. & E. 94; 28 L. J. (Q.B.) (N.S.) 310.

goods, a writ cannot be issued against him in such a sense that he could be sued with effect. For these reasons, we are of opinion that the Statute of Limitations did not begin to run during the time Musurus Pacha was in England.

Another point, to my mind of still more importance, was made for the plaintiff. Musurus Pacha, after his return to Turkey in February, 1886, was beyond the seas until the date of the defendants' counter-claim, and therefore, primâ facie, the statute would not, during that time, begin to run against the defendants. It was argued, however, that by reason of the jurisdiction given, or given effect to, by Order XI. of the Rules of the Supreme Court, it would have been possible at any time since 1883, when Order XI. came into force, to issue a writ for service out of the jurisdiction, and obtain leave to serve it, or a copy of it, upon the ambassador out of the jurisdiction. It was said that, if this had been done, Musurus Pacha would have been bound, at any rate in regard to any assets he had in this country, by a judgment obtained against him, and that the Statute of Limitations could have been saved. We were invited to hold that Order XI. ought to be so construed as to nullify the effect of 4 & 5 Anne, c. 16, s. 19, which, in favour of plaintiffs, suspends the running of the Statute of Limitations whilst the defendant is beyond the seas. We have come to the conclusion that we ought not to hold that Order XI. was intended to nullify that long-established right of plaintiffs. We do not consider it necessary or proper in this case to attempt to settle what is the precise effect of giving leave to serve notice of a writ upon a foreigner out of the jurisdiction. That question in its relation to the statute of Anne may be a very difficult one to determine. In the absence of any authority on the point, we are of opinion that we ought not, in this Court, to hold that Order XI. has the effect contended for of altering the rights of plaintiffs under the statute of Anne, but that we ought to leave it to the Court of Appeal to hold, if necessary, that so important a change has been effected by the giving, under Order XI., of what is apparently intended to be an auxiliary, rather than an original, jurisdiction.

We are, therefore, of opinion that the Statute of Limitations

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has not run out as against the defendants in respect of their counter-claim, and that upon the question now before us for our determination there must be judgment for the defendants.

Judgment for the defendants on the question of the Statute of Limitations; case left part heard on other questions. (1)

Solicitors for defendants: *Austin & Austin.*
Solicitors for plaintiff: *Busk & Mellor.*

W. A.

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Feb. 23.

NEAL *v.* DEVENISH.

Adulteration—Prosecution for—Summons—Insufficient Particulars of Offence charged—Jurisdiction of Justices—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 *Vict. c.* 30), *s.* 10.

Although s. 10 of the Sale of Food and Drugs Act Amendment Act, 1879, provides that in all prosecutions under the principal Act particulars of the offence of which the seller is accused shall be stated on the summons, the omission of such particulars from the summons does not deprive the justices of jurisdiction, but merely entitles the defendant to an adjournment of the hearing in the event of the justices being satisfied that he is prejudiced by such omission.

Barnes v. *Rider* (62 L. J. (M.C.) 25) disapproved.

CASE stated by justices for the borough of Dorchester.

The appellant was, on December 23, 1893, served with a summons under the Sale of Food and Drugs Act, 1875, at the instance of the respondent, which charged that he, "on December 11, 1893, at the parish of St. Peter, in the borough aforesaid, did unlawfully sell, to the prejudice of the said Walter Devenish, the purchaser, a certain article of food, to wit, milk, which was adulterated, and was not of the nature, substance, and quality demanded by the purchaser, contrary to s. 6 of the Sale of Food

(1) The case was left part heard because there appeared to have been some misunderstanding between counsel for the respective parties as to whether other points of law raised by the pleadings should, or should not, be determined on the argument of the special case, and the Court thought that further time should be given to enable the facts necessary to raise those points to be agreed upon, if possible, and inserted in the special case.

and Drugs Act, 1875." The appellant appeared to the summons, and, upon the case being called on, at once objected that particulars of the offence charged were not stated in the summons, as required by s. 10 of the Sale of Food and Drugs Act Amendment Act, 1879, and contended that such defect in the summons was fatal to it. The justices held that the defendant was not misled by the form of the summons, and that the statement therein that the milk was adulterated sufficiently indicated that the defect in the milk complained of was its adulteration, and not the abstraction of its fat. They accordingly overruled the objection, and, having heard the case, convicted the appellant, subject to a case for the opinion of the Court as to whether the sufficiency of the particulars was a matter for the justices to decide.

Hohler, for the appellant. Sect. 10 of the Sale of Food and Drugs Act, 1879, provides that, "In all prosecutions under the principal Act, particulars of the offence or offences against the said Act of which the seller is accused shall be stated on the summons." That provision is imperative, and non-compliance with it renders the summons bad. In *Barnes* v. *Rider* (1) the appellant was convicted upon a summons which charged him with selling milk not of the nature, substance, and quality demanded by the purchaser, and stated no further particulars of the offence; at the commencement of the hearing he objected that the summons was bad, as not stating what the defect in the milk complained of was—whether it was the addition of water or abstraction of fat; the magistrate overruled the objection, and found as a fact that the cause of complaint—namely, that the milk had been adulterated by the addition of water—had been communicated by the respondent to the appellant before the summons was issued. On appeal, however, the Divisional Court held the objection to the summons fatal, and quashed the conviction. That case is directly in point in the appellant's favour.

No counsel appeared for the respondent.

MATHEW, J. This conviction must be upheld. It has been contended that the summons failed to disclose full particulars of

(1) 62 L. J. (M.C.) 25.

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the offence charged, and that in consequence of such omission the justices had no jurisdiction to hear the case. With that contention I cannot agree. In the first place, I am of opinion that the justices were right in holding that this summons, in fact, gave sufficient particulars. It called the appellant's attention to the section under which he was charged, and to the fact that the nature of the charge was one of adulteration. And that is quite enough. But, even supposing the particulars were to be treated as insufficient, the fact that they were so would not take away the justices' jurisdiction. The proper course for a defendant, if he is really prejudiced by want of information as to the nature of the charge, is to ask for an adjournment. We were referred to the case of *Barnes* v. *Rider* (1) as supporting the appellant's contention; but that case seems to me to be entirely opposed to the earlier case of *Reg.* v. *Wakefield.* (2)

CAVE, J. I am of the same opinion. But for the case of *Barnes* v. *Rider* (1), the present case would have been unarguable. Sect. 10 of the Act of 1879, no doubt, requires that the summons shall contain particulars of the offence of which the seller is accused; but that requirement must be interpreted by the light of the general rule relating to summonses laid down in Jervis' Act—namely, that no objection shall be taken to any summons for any alleged defect therein in substance or in form, but that if the defendant appears to have been misled thereby the justices may adjourn the hearing of the case to some future day. If the summons under the Sale of Food and Drugs Act does not give the defendant sufficient particulars to enable him to prepare his defence, his remedy is to apply for an adjournment, and the justices will grant it if they think the circumstances of the case demand it. The sufficiency of such particulars, however, is entirely a matter for them, and not one on which they ought to state a case for the Court. This is clearly laid down in *Reg.* v. *Wakefield.* (2) There the defendant was convicted of selling milk not of the nature, substance, and quality demanded by the purchaser; but the summons gave no particulars as to how the milk was adulterated. The defendant did

(1) 62 L. J. (M.C.) 25. (2) 54 J. P. 148.

not ask for an adjournment, but contended that a statement of the particulars of the offence charged was a condition precedent to the jurisdiction of the justices, which was the very point that was taken here in the present case. A rule having been obtained calling on the justices to state a case, the Court held that the omission of particulars did not go to the jurisdiction, and that the question whether sufficient particulars had been given was one for the justices to decide, and they discharged the rule. That decision entirely expresses my own view. But we were pressed with the later case of *Barnes* v. *Rider* (1), where the Court allowed an appeal on the ground of the insufficiency of the particulars, and intimated that the magistrate ought to have dismissed the summons. It may be desirable that the summons should state whether the ground of complaint against the milk is its adulteration with water or the abstraction of its fat; but to hold that it is essential that it should do so would be to lose sight of the only object of particulars, which is to give the defendant notice of the nature of the charge. So long as the defendant has sufficient notice, it cannot be material whether he gets it from the summons or from elsewhere. I cannot agree with the decision in *Barnes* v. *Rider* (1), for it is in flat contradiction with *Reg.* v. *Wakefield* (2), and entirely opposed to the practice under Jervis' Act.

Appeal dismissed.

Solicitors for appellant: *Andrews, Son, & Huxtable.*

(1) 62 L. J. (M.C.) 25.

(2) 54 J. P. 148.

J. F. C.

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Dec. 16.

[CROWN CASE RESERVED.]

THE QUEEN *v.* TANKARD.

Criminal Law—Embezzlement—Illegal Association — Property — Beneficial Owners—31 *&* 32 *Vict. c.* 116, *s.* 1—*Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 4.

The defendant was convicted on an indictment, drawn under 31 & 32 Vict. c. 116, s. 1, and charging him with having, whilst one of a number of beneficial owners consisting of himself, J., and others, embezzled money belonging to such beneficial owners. It was proved at the trial that the prisoner was the treasurer and a member of a trading club, which was an unregistered association of more than twenty persons such as is prohibited from being formed by s. 4 of the Companies Act, 1862, and that he received money belonging to the association and failed to pay over or account for it:—

Held, that the prisoner was properly convicted.

CASE reserved by the recorder of Bradford.

The prisoner, Michael Naylor Tankard, was tried at the Bradford Quarter Sessions, held on October 20, 1893, for that he on, &c., "being then one of a number of beneficial owners called the Bowling Feast Club, consisting of the said M. N. Tankard, W. K. Jackson, and others, did then, and whilst he was one of such beneficial owners as aforesaid, receive and take into his possession certain money to the amount, &c., for and in the name of and on account of the said beneficial owners, and the said money then fraudulently and feloniously did embezzle; and so the jurors, &c., do say that the said M. N. Tankard then in manner and form aforesaid the said money the property of the said beneficial owners as aforesaid from the said beneficial owners as aforesaid feloniously did steal take and carry away contrary to the statute," &c.

The indictment was drawn under 31 & 32 Vict. c. 116, s. 1, which enacts that "if any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money . . . shall steal or embezzle such money . . . every such person shall be liable to be . . . tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership, or one of such beneficial owners."

It was proved that the prisoner, W. K. Jackson, and about twenty-eight other persons, were the members of and constituted the Bowling Feast Club mentioned in the indictment, the prisoner being the treasurer of the club. The club traded with its members in coal and cloth, from which trading profits were made. Profits were also derived from fines and interest on loans paid by the members, and the whole of the proceeds of the club, consisting of such profits and the subscriptions, were divided equally among all the members at a fixed date in each year. The prisoner failed to produce or account for certain moneys, mentioned in the indictment, which he had received on account of the club, and for which he was accountable under the rules of the club. The club was not registered as a company under the Companies Act, 1862 (25 & 26 Vict. c. 89), or formed in pursuance of any other Act of Parliament, or of letters patent. The prisoner was convicted, and sentenced to a term of imprisonment.

The question for the opinion of the Court was whether he was properly convicted on the indictment.

T. R. D. Wright, for the prisoner. The conviction is bad, because the evidence established that the Bowling Feast Club was an illegal association within s. 4 of the Companies Act, 1862 (25 & 26 Vict. c. 89), which enacts that "no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this Act," for the purpose of carrying on any business (other than banking) that has for its object the acquisition of gain, unless it is registered as a company under the Act, or formed in pursuance of some other Act or of letters patent, or is a company engaged in working mines within the jurisdiction of the Stannaries. This association, therefore, was incapable of holding property, or entering into valid contracts in respect of it. The incapacity has been established in civil actions: *Jennings* v. *Hammond* (1); *Shaw* v. *Benson* (2); *In re Padstow Total Loss and Collision Assurance Association.* (3) If the property had been laid in the indictment as the property of "The

(1) 9 Q. B. D. 225. (2) 11 Q. B. D. 563.
(3) 20 Ch. D. 137.

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Bowling Feast Club," it would be the same thing as if it had not been laid in any one, and the difficulty was not got over by laying it as the property of the prisoner, W. K. Jackson, and others, when once the evidence established that it was really the property of an illegal association. *Reg.* v. *Stainer* (1) is not an authority against this contention. The decision only was that a society in the nature of a trade union could prosecute its servant for embezzlement, notwithstanding that some of the society's rules were void as being in restraint of trade. In *Reg.* v. *Hunt* (2) it was held that the clerk of an association made criminal by statute could not be convicted of embezzling the money of the association. It is no answer to the objection to say that, if it be well founded, the property of the association could be lawfully taken by anybody who could get it, and that such a result is an absurdity. In *Reg.* v. *Robson* (3) a member of an association having for its object, not the acquisition of gain, but "the spiritual and mental improvement of its members," was held not to be a member of a "co-partnership" within 31 & 32 Vict. c. 116, s. 1, and therefore not liable to be convicted of embezzling the moneys of the co-partnership. It followed there that any member could steal or embezzle the property of the association without being liable to be convicted. *Rex* v. *Boulton* (4) does not apply to the present case. The Companies Act, 1862, deprives such an association as this of any legal existence. Therefore, when the property passed to the prisoner no civil proceedings could be brought against him in respect of it; and, it is contended, no criminal proceedings.

Walter Beverley, for the Crown, was not heard.

LORD COLERIDGE, C.J. The indictment in this case is drawn under 31 & 32 Vict. c. 116, s. 1, which is in these terms:—[His Lordship read s. 1.] It would almost seem as if the enactment was for the very purpose of sweeping away such an objection as has been taken here. There are a number of persons who join themselves together, not for any criminal purpose, but their joining together is not legalized. It is true that they have no legal existence as a company, association, or co-partnership; but

(1) 39 L. J. (M.C.) 54.
(2) 8 C. & P. 642.
(3) 16 Q. B. D. 137.
(4) 5 C. & P. 537.

they are none the less beneficial owners of property. In the indictment, the property was properly laid in the prisoner, W. K. Jackson, and others as beneficial owners. It does not follow that, because the club had no legal existence as a company, association, or co-partnership, the members had no legal existence as beneficial owners of property. It is untrue to say that they are not beneficial owners in fact. It has been decided, in *Reg.* v. *Stainer* (1), before trade unions were legalized, that, where the property was laid in an association in the nature of a trade union, it did not follow that a person could not be convicted of stealing or embezzling their property, because the association did not in all respects conform to the law, and the grounds of that decision apply here. It seems to me that the case for the prisoner is gone the moment his counsel is obliged to admit that, if his contention be good, the property belonged to nobody, and could, so to speak, be scrambled for. It would be a very strong thing to hold that an association not expressly sanctioned by law, yet not criminal, is incapable of holding any property at all.

I am of opinion that the conviction should be affirmed.

MATHEW, J. I am of the same opinion. I think that the persons who framed s. 1 of 31 & 32 Vict. c. 116, did it for the purpose of meeting such cases as this. The members of the club were clearly "beneficial owners" within the meaning of the section.

GRANTHAM, J. I am of the same opinion. The statute 31 & 32 Vict. c. 116, to my mind, is conclusive.

LAWRANCE and COLLINS, JJ., concurred.

Conviction affirmed.

Solicitor for the prisoner: *M. Banks Newell, Bradford.*
Solicitor for the Crown: *The Solicitor to the Treasury.*

(1) 39 L. J. (M.C.) 54.

W. A.

C. A.

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Jan. 15; *Feb.* 2.

[IN THE COURT OF APPEAL.]

FARQUHARSON *v.* MORGAN.

Prohibition—County Court—Absence of Jurisdiction apparent on face of Proceedings — Discretion — Acquiescence in Exercise of Jurisdiction — Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 24.

Where total absence of jurisdiction appears on the face of the proceedings in an inferior court, the Court is bound to issue a prohibition, although the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior court.

By the terms of the lease of a farm it was agreed that upon the determination of the lease certain matters not within the Agricultural Holdings (England) Act, 1883, should be the subject of compensation to the tenant, and that the procedure contained in ss. 7 to 28 of that Act should apply to such matters as well as to any claim under the Act. Upon the determination of the lease, the tenant's claim for compensation was referred to arbitration in the manner provided by the Act; and an award was made, which on the face of it shewed that compensation had been awarded to him for matters not within the Act. A county court judge made an order to enforce the award by execution as on an ordinary county court judgment under s. 24 of the Agricultural Holdings Act, 1883:—

Held, upon an application by the lessor for a prohibition to the county court against proceeding upon such order, that the writ must issue, notwithstanding the agreement contained in the lease, and the fact that the lessor had by his conduct acquiesced in the exercise of jurisdiction by the county court.

Appeal from the order of a Divisional Court (Charles and Wright, JJ.), refusing an application for a prohibition to the county court of Dorsetshire.

The facts, so far as material, were as follows:—

By lease, dated November 29, 1888, the appellant Farquharson let a farm to the respondent Morgan from year to year. The lease provided that, on the determination of the tenancy, the tenant should be entitled to allowances and compensation in respect of various matters which were not the subject of compensation under the Agricultural Holdings (England) Act, 1883, to be ascertained upon the basis provided by that Act; and it was agreed thereby that the clauses of that Act relating to procedure, and contained in ss. 7 to 28 (both inclusive) thereof, should apply as well to any claim for allowance or compensation to be made under the lease as to any claim under the said Act.

Prior to the determination of the tenancy, which took place on March 25, 1891, the respondent gave a notice of claim to the appellant, setting forth the matters in respect of which he claimed compensation at the determination of the tenancy. His claim included items which were the subject of compensation under the lease, but not under the Agricultural Holdings (England) Act, 1883. The appellant gave a counter notice of claim against the respondent under the Act. The parties respectively appointed referees to act for them in the matter, and such referees appointed an umpire. The referees being unable to agree, the umpire made an award in the matter, awarding that a lump sum of 92*l.* 12*s.* 9*d.* ought to be paid by the appellant to the respondent, as the balance due to the latter after allowing the amount due to the former. The respondent thereupon applied to the county court to enforce payment of the sum awarded under s. 24 of the Agricultural Holdings Act, 1883. On such application the appellant took objection to the form of the award, because it awarded a sum generally for compensation, and did not specify particulars of the compensation awarded, as required by s. 19 of the Agricultural Holdings Act, 1883. He did not then take any objection to the jurisdiction of the county court. The award was remitted to the umpire by consent of both parties in order that he might amend it in conformity with s. 19. The umpire accordingly amended his award by stating particulars, from which it appeared that it included compensation to the respondent in respect of matters which were the subject of compensation under the lease, but not under the Agricultural Holdings Act, 1883.

The appellant appealed against the amended award to the county court. On the hearing of such appeal it was contended on behalf of the appellant, inter alia, that the award was invalid in law and bad in form; that the compensation had been awarded for certain improvements, acts, and things in respect of which the tenant was not entitled to compensation under the Agricultural Holdings Act; that there had been no valid submission under the Act, and no appointment of arbitrators or umpire; and that various sections of the Act had not been complied with in drawing up the award. The county court judge dismissed the appeal on the ground that the notice of appeal against the

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award was not given within the time prescribed by the Agricultural Holdings Act; but stated a case for the opinion of the High Court of Justice. Upon that case coming on for hearing before the Queen's Bench Division, it was ordered, by the consent of the parties, that the matter of the appeal should be remitted to the county court judge to be reheard upon the merits; that no objection should be taken by the appellant to the appointment of another umpire, the Court being of opinion that there is power to send the award back to a new umpire under s. 9 of the Agricultural Holdings Act; and that the county court judge should deal with all matters of fact and law, subject to his stating a special case upon any points of law if he should think fit. Upon the case coming again before the county court judge, he affirmed the award; and on July 21, 1893, upon the application of the respondent, he made an order under s. 24 of the Agricultural Holdings Act, 1883, to enforce payment of the sum awarded by execution as in the case of money ordered by a county court under its ordinary jurisdiction to be paid.

The appellant thereupon applied at chambers to prohibit the county court from proceeding upon such order, upon the ground that the county court judge had no jurisdiction to enforce the award under the Agricultural Holdings Act, s. 24. The application was referred to the Divisional Court, which held that, under the circumstances, it had a discretion to refuse to issue the writ on the application of the appellant, and, therefore, dismissed the application.

Danckwerts, for the appellant. The award shews on the face of it that the umpire awarded compensation in respect of items of claim not within the Agricultural Holdings Act. The county court had no jurisdiction to enforce the payment of the compensation so awarded under s. 24 of the Act. The appellant may have assented to the county court judge's dealing as an arbitrator with the matters which were the subject of compensation under the lease, but not under the Act; but it is contended that nothing which he did imports consent to the county court's having power to issue execution under s. 24 as to those

matters. The appellant is willing that the prohibition should be confined to so much of the county court judge's order as relates to matters outside the Act. With regard to that part of the award, the respondent's remedy is to bring his action as on an award at common law.

Where there has been an apparent excess of jurisdiction the issue of the writ of prohibition is of right, not discretionary, and the acquiescence of the applicant in the exercise of the jurisdiction does not preclude him from applying for the writ; for consent cannot give jurisdiction: *Worthington* v. *Jeffries.* (1) In the case of *Broad* v. *Perkins* (2), the Court of Appeal, acting on a passage in the opinion of Willes, J., delivered to the House of Lords in *Mayor of London* v. *Cox* (3), refused to grant a prohibition; but that passage does not appear to apply to cases where the want of jurisdiction is apparent on the face of the proceedings, but only to cases where it depends on some fact in the knowledge of the applicant which he has kept back from the Court below. [He also cited *Knowles* v. *Holden* (4); *Jones* v. *James* (5); *Mouflet* v. *Washburn.* (6)]

Clavell Salter, for the respondent. Except where the want of jurisdiction is apparent on the record, the Court have a discretion to refuse the writ, where there has been misconduct or laches on the part of the applicant. Here the appellant, by the terms of the lease, agreed that the matters not within the Agricultural Holdings Act should be dealt with by the same method of procedure as that applicable to compensation under the Act; and his conduct in the course of the subsequent proceedings before the county court and the Queen's Bench Division amounted to acquiescence in the jurisdiction of the county court. The whole matter was, with his consent, remitted to the county court judge. The appellant has been guilty of misconduct within the meaning of the opinion delivered by Willes, J., in *Mayor of London* v. *Cox.* (3) There has always been a distinction drawn between cases where the want of jurisdiction appears on a record and those where it does not, the reason being that the former might

(1) Law Rep. 10 C. P. 379.
(2) 21 Q. B. D. 533.
(3) Law Rep. 2 H. L. 239.
(4) 24 L. J. (Ex.) 223.
(5) 19 L. J. (N.S.) (Q.B.) 257.
(6) 54 L. T. 16.

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be drawn into a precedent. There is no record in that sense in the county court. There is no reason why "misconduct" for this purpose should be confined to the keeping back of a matter of fact on which the jurisdiction depends. If it is possible for the applicant for a prohibition to estop himself by his conduct from applying, it is impossible to lay down any hard-and-fast rule as to the sort of conduct which will estop him. The Court is not bound to grant him a prohibition where it sees that it would be unjust and unreasonable or oppressive that he should have one.

[He cited *Denton* v. *Marshall* (1); *Jones* v. *James*. (2)]

Danckwerts, in reply.

Cur. adv. vult.

Feb. 2. The following judgments were delivered:—

LORD HALSBURY. In this case, with every disposition to decline to interfere with the proceedings in the county court on the ground that, if it is possible for a person to render himself incapable of applying for a prohibition in such a case as this, the appellant has done so, I feel nevertheless constrained to decide that the writ must issue to prohibit further proceedings on the order of the county court so far as it is applicable to that portion of the award which is in respect of matters outside the Agricultural Holdings Act. It has been long settled that, where an objection to the jurisdiction of an inferior Court appears on the face of the proceedings, it is immaterial by what means and by whom the Court is informed of such objection. The Court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior Court from proceeding in matters as to which it is apparent that it has no jurisdiction. The objection to the jurisdiction does not in such a case depend on some matter of fact as to which the inferior Court may have been deceived or misled, or which it may have unconsciously neglected to observe, and the judge of such Court, therefore, must or ought to have known that he was acting beyond his jurisdiction. I find no authority justifying the withholding of a writ of prohibition in such a case. Looking to what

(1) 32 L. J. (Ex.) 89. (2) 19 L. J. (N.S.) (Q. B.) 257.

appears on the face of the award in this case, and applying to that the provisions of the Agricultural Holdings Act and the power of enforcing awards given by that Act, I think it is impossible to doubt that there is that on the face of the proceedings which shews that the judge in granting execution under the provisions of that Act was acting beyond his jurisdiction. The Act specifies the matters which are to be the subject of compensation under it; and it appears on the face of the award that there are matters included in the compensation awarded which are outside the provisions of the Act. Sect. 24 of the Act provides in substance that a sum awarded as compensation under the Act may be recovered on the order of the county court judge as money recovered by an ordinary county court judgment. It is apparent that, in applying that section to subject-matters which are not included in the provisions of the Act, the county court was exceeding its jurisdiction. Under these circumstances, reluctant as I am to aid the appellant in this case, I am unable to resist the conclusion that the writ ought to issue. Considering the course of the litigation, I think the appellant ought not to have any costs of the proceedings except in this Court where he has succeeded.

LOPES, L.J. This case raises the much vexed question whether the grant of prohibition is discretionary, or whether it is demandable of right.

It seems to me that there has always been recognised a distinction between what I will call a latent want of jurisdiction, i.e., something becoming manifest in the course of the proceedings, and what I will call a patent want of jurisdiction, i.e., a want of jurisdiction apparent on the face of the proceedings.

Whilst in cases of latent want of jurisdiction there has always been a great conflict of judicial opinion, as to whether the grant of the writ was discretionary or not, the authorities seem unanimous in deciding that, where the want of jurisdiction is patent, the grant of the writ of prohibition is of course.

Lord Mansfield, in *Buggin* v. *Bennett* (1), held that the Court was not bound to grant a prohibition to a party who had

(1) 4 Burr. 2037.

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acquiesced in the proceedings of the Court below, except where the absence of jurisdiction was apparent on the face of the proceedings.

In *Bodenham* v. *Ricketts* (1), Lord Denman laid down the rule in the same terms as Lord Mansfield; and about the same time the same rule was adopted in a considered judgment of the Court of Queen's Bench in *Yates* v. *Palmer*. (2)

In the elaborate opinion of the judges delivered by Willes, J., to the House of Lords in *Mayor of London* v. *Cox* (3), it is said that "upon an application being made in proper time, upon sufficient materials, by a party, who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the Court;" and at p. 283 of the same case it is said: "Where, however, the defect is not apparent, and depends on some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Crown is not taken away, for mere acquiescence does not give jurisdiction: *Knowles* v. *Holden* (4); yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and on excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant."

It was held in that case that the writ was not of course, inasmuch as there might be circumstances which would justify the Court in refusing it, such as undue delay, insufficient materials, or misconduct or laches by the party applying for it. But there is nothing in the case contravening the rule, which I have mentioned, where the absence of jurisdiction is apparent on the face of the proceedings; in fact, there is an express exception of such cases.

(1) 6 N. & M. 170.
(2) 6 D. & L. 283.
(3) Law Rep. 2 H. L. 239, at p. 279.
(4) 24 L. J. (Ex.) 223.

In 1888, in a case of *Broad* v. *Perkins* (1), the question whether, in the circumstances of that case, the Court had any jurisdiction to refuse a writ of prohibition, was directed to be argued before the full Court of Appeal; and Lord Esher, M.R., delivering the judgment of the full Court, repeated the opinion of Willes, J., in *Mayor of London* v. *Cox* (2), which I have above cited.

The result of the authorities appears to me to be this: that the granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction, and that, where the absence or excess of jurisdiction is not apparent on the face of the proceedings, it is discretionary with the Court to decide whether the party applying has not by laches or misconduct lost his right to the writ to which, under other circumstances, he would be entitled. The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings, is explained by Lord Denman in *Bodenham* v. *Ricketts* (3) to be for the sake of the public, lest "the case might become a precedent if allowed to stand without impeachment," and, I will add for myself, because it is a want of jurisdiction of which the Court is informed by the proceedings before it, and which the judge should have observed, and of which he himself should have taken notice.

Now, if it were possible for him to do so, it is abundantly clear that Mr. Farquharson has by his conduct precluded himself from claiming the interposition of the Court in his favour. That he has acquiesced in the proceedings is beyond dispute. I cannot imagine a stronger case of acquiescence.

But I am of opinion that the award on the face of it discloses a want of jurisdiction. It contains and deals with matters which are not the subject of the Agricultural Holdings Act, matters outside that Act, and which cannot be enforced under the 24th section of that Act.

In such circumstances, most reluctantly I am compelled to hold that the writ of prohibition must issue.

(1) 21 Q. B. D. 533. (2) Law Rep. 2 H. L. 239.
(3) 6 N. & M. 170.

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DAVEY, L.J. There are two principles which are engrained in our law. One is, that parties cannot by contract oust the jurisdiction of the Queen's Courts. This has been somewhat modified by the power given to the Court by s. 11 of the Common Law Procedure Act, 1854 (now s. 4 of the Arbitration Act, 1889), to give effect to an agreement to refer disputes to arbitration, subject to certain well-known conditions; but, subject to this power, it is no defence to an action otherwise competent that the parties have agreed to refer the question in dispute to arbitration, or to provide for its settlement in some other mode.

The other principle is correlative to the first: it is that the parties cannot by agreement confer upon any Court or judge a coercive jurisdiction which the Court or judge does not by law possess. To do so would be an usurpation of the prerogative of the Crown, and it has always been the policy of our law as a question of public order to keep inferior Courts strictly within their proper sphere of jurisdiction: see the judgment of the Common Pleas in *Worthington* v. *Jeffries*. (1) It follows that a party may, notwithstanding that he has contracted to have the dispute decided, or a decision in the matter enforced, by a Court not possessing by law jurisdiction, refuse to be bound by his contract and object to the jurisdiction, subject to the provisions embodied in the Arbitration Act, 1889, so far as applicable. It also follows that jurisdiction cannot be given by acquiescence. These principles are so well known that they need no illustration from decided cases or other authority.

In the present case Mr. Farquharson, the applicant for a prohibition, has contracted by the lease of November 29, 1888, that the clauses of the Agricultural Holdings (England) Act, 1883, relating to procedure, and contained in ss. 7 to 28 (both inclusive) thereof, shall apply as well to any claim of the outgoing tenant for allowance or compensation to be made under the provisions of the lease as to any claim under the said Act. The lease makes provision for certain allowances and compensation being made to an outgoing tenant at the expiration of the lease as to various matters which are not the subjects of

(1) Law Rep. 10 C. P. 379.

allowance or compensation under the Act. An amended award has been made, dealing as well with matters which are properly subjects of allowance or compensation under the Act as with matters in respect of which allowance or compensation can only be claimed under the provisions of the lease; and the amended award, on the face of it, shews the matters in respect of which the sums thereby awarded are given.

On July 21, 1893, the present respondent Morgan made an application to the county court to enforce the award; and the learned judge, though he had doubts whether he had jurisdiction, made an order to that effect.

The present applicant and appellant applied to the High Court for a prohibition against the county court enforcing the award or proceeding further with the application. A Divisional Court has dismissed that application on the ground that under the circumstances the Court had a discretion to refuse the prohibition on the application of the present appellant.

The jurisdiction of the county court in the matter is statutory, and is conferred by the Agricultural Holdings Act. Sect. 24 of that Act is in the following terms: "Where any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed or awarded or ordered to be paid, it shall be recoverable, upon order made by the judge of the county court, as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable." It is obvious that this section only applies to money agreed or awarded or ordered on appeal to be paid in respect of matters within the Act, and gives no jurisdiction over awards as to other matters made pursuant to a contractual submission or with the consent of the parties. Indeed, it was not and could not be denied that so far forth as the award related to matters outside the Act, the county court judge had no jurisdiction to enforce the award, and the applicant was primâ facie entitled to the prohibition. But it was argued that the granting of a prohibition is discretionary, and that the applicant was estopped or precluded by his conduct from claiming a prohibition. Reliance was placed on a well-known passage in Willes, J.'s, judgment in *Mayor of London* v.

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Cox (1), which has been cited by Lopes, L.J. This passage has been adopted by the full Court of Appeal in *Broad* v. *Perkins.* (2) It will, however, be observed that the learned judge's statement is confined to cases where the defect is not apparent and depends upon some fact in the knowledge of the applicant which he might have brought forward in the Court below, but has kept back without excuse, i.e., where the applicant has been guilty of some misconduct in the proceedings, and has in a sense misled the Court. To the same effect is Lord Mansfield's judgment in *Buggin* v. *Bennett.* (3) He there says: "If it appears upon the face of the proceedings that the Court below have no jurisdiction, a prohibition may be issued at any time, either before or after sentence; because all is a nullity; it is coram non judice. But where it does not appear upon the face of the proceedings, if the defendant will lie by and suffer that Court to go on under an apparent jurisdiction, as upon a contract made at sea" (he was dealing with an Admiralty case), "it would be unreasonable that this party who, when defendant below, has thus lain by and concealed from the Court below a collateral matter, should come hither after sentence against him there and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it after all this acquiescence in the jurisdiction of the Court below." This passage was quoted by Parke, B., in *Roberts* v. *Humby* (4), in which case the Court granted a prohibition at the instance of a party to the proceedings in a case where the want of jurisdiction appeared on the face of the proceedings, even after sentence in the inferior Court. The reason of the distinction between cases in which the excess of jurisdiction appears on the face of the proceedings, and where it does not so appear, is explained by Coleridge, J., in *Marsden* v. *Wardle.* (5) "There is reason," says the learned judge, "for refusing the writ after judgment in the Courts where the proceedings set forth the detail of the matter, and the party has the opportunity of moving before judgment. Then, if he chooses to wait and take

(1) Law Rep. 2 H. L. 239, at p. 283.

(2) 21 Q. B. D. 533.

(3) 4 Burr. 2037.

(4) 3 M. & W. 120.

(5) 3 E. & B. 695, at p. 701.

the chance of judgment in his favour, he may be held incompetent to complain of excess of jurisdiction if judgment is against him. There is, however, good reason for departing from this principle where the defect is apparent on the face of the proceedings below; because the complaint in that case does not rest on the evidence of the complainant; and, if such a defective record were allowed to remain and to support a judgment, it might become a precedent: that which was in truth an excess of jurisdiction might be considered to have been held to be legal."

The learned judge is there evidently contrasting cases where the excess of jurisdiction depends on the evidence of the complainant with cases in which it is apparent on the face of the proceedings. In the county court, it is true, there is no record, strictly speaking; but the distinction does not, I think, depend on the existence of a formal record, but is one of substance, whether the defect is apparent or depends on evidence.

In the present case the jurisdiction invoked is the creature of a statute, not even conferring jurisdiction in general terms, but confined to a particular defined subject-matter. The first question which a judge has to ask himself, when he is invited to exercise a limited statutory jurisdiction, is whether the case falls within the defined ambit of the statute; and it is his duty to decline to make an order as judge, if and so far as the matter is outside the jurisdiction; and if he does not do so, he may (if a judge of an inferior Court) be restrained by prohibition. In the present case the limits of the jurisdiction appeared, I repeat, on the face of the statute, and the fact of the excess appeared on the face of the amended award which the Court was asked to enforce.

I am, therefore, of opinion that the appellant is not precluded from relying on the excess of jurisdiction in the county court, either by his covenant in the lease or by the previous proceedings in relation to the award.

In *Jones* v. *James* (1), which was cited on behalf of the respondent, it is to be observed that it was doubtful whether the Court had exceeded its jurisdiction, and Erle, J., seems to have treated

(1) 19 L. J. (N.S.) (Q.B.) 257.

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the matter as an irregularity in practice which might be cured by the defendant's waiver. And the case of *Mouflet* v. *Washburn* (1) seems to have been a case of the same character. In *Jones* v. *Owen* (2), on the other hand, which was in the matter of proceedings in a county court, it was contended that the attorney for the defendant had not objected to the jurisdiction; but Patteson, J., said that "there was a total want of jurisdiction which no assent could cure."

The summons asks for a prohibition against the county court judge enforcing the whole award; but at the bar the learned counsel for the appellant limited the prohibition asked for to so much of the award as dealt with matters outside the Agricultural Holdings Act.

Although I think that the applicant is not precluded from asking for a prohibition, yet he is doing so in breach of his contract, and I think there should be no costs in the Court below; but the appellant should have the costs of the appeal.

Appeal allowed.

Solicitor for appellant: *Rowcliffes & Co., for Trevor Davies, Sherborne.*

Solicitors for respondent: *Field, Roscoe & Co.*

(1) 54 L. T. 16. (2) 5 D. & L. 669.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1894
Feb. 13.

HADDOW *v.* MORTON. TROUT, CLAIMANT.

County Court—Interpleader—Goods taken in Execution—Deposit in Court of Value of Goods by Claimant—Money deposited paid out to Judgment Creditor—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 156—*County Court Forms*, 1889, *Form* 187.

Goods, which had been taken in execution of the judgment of a county court, were claimed by a person who, under the provisions of s. 156 of the County Courts Act, 1888, deposited the value of the goods with the bailiff to abide the decision of the judge upon the claim. On the trial of an interpleader issue the claim was not established, and the money deposited was paid out to the judgment creditor. The money so paid out being insufficient to satisfy the judgment, the judgment creditor caused the goods to be seized again for the purpose of realizing the balance of his judgment. The claimant again claimed them and deposited their value with the bailiff. Upon a second interpleader issue between the same parties:—

Held, affirming the judgment of the Queen's Bench Division, that, by taking out of Court the money deposited by the claimant on the first occasion, the judgment creditor accepted the money in lieu of the goods, and thereby estopped himself in respect of the same judgment from denying that as against himself the claimant was the owner of the goods; and therefore that the claimant was entitled to judgment on the issue.

APPEAL from the judgment of a Divisional Court (Charles and Wright, JJ.) allowing an appeal from a county court.

The facts are fully stated in the report of the case in the Court below. (1)

Cluer, for the judgment creditor. On the interpleader issue, the onus of establishing her claim lies on the claimant, who must therefore prove that the goods are hers and not the judgment debtor's. The order upon the first interpleader issue adjudges the goods to be the property of the judgment debtor. That may refer to the date of the execution; but nothing has occurred since to transfer the property to the claimant. The payment into Court and taking the money out has not that effect, and the Divisional Court so held. It is just the same as if a friend of the judgment debtor had paid money in order that the goods might be given up, and then another judgment had been

(1) Ante, p. 95.

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obtained by the judgment creditor and the goods seized on that judgment. It is clear that the claimant would have no title to the goods as against another judgment creditor; and therefore why should she have a title as against this judgment creditor, claiming to seize for the balance of the same judgment? This judgment creditor clearly would not be estopped if he had caused the goods to be taken in execution on another judgment. What difference in principle can there be between another judgment and the balance of the same judgment? If the result is that the judgment creditor gets the value of the goods from the claimant twice over, that is the fault of the claimant in setting up a groundless claim. She should not have claimed a second time when the goods had been adjudged not to be hers on the first interpleader issue.

Lawson Walton, Q.C., for the claimant, was not called upon.

LORD ESHER, M.R. I think that this appeal must be dismissed. The question is whether the judgment creditor is entitled to succeed in this interpleader issue as against the claimant, and to take the money which she has paid in out of Court. The judgment creditor had on a previous occasion caused the same goods to be taken in execution on the same judgment; and, the claimant having claimed them, an issue was tried as between the judgment creditor and the claimant, in which the former succeeded, and he thereupon took out of Court the money which had been paid in by the claimant on that occasion, as representing the full value of the goods seized. The goods having been seized again in execution on the same judgment, the claimant has claimed them again and paid money into Court on a second interpleader proceeding. The judgment creditor claims that in respect of the same judgment he is entitled to succeed on the second interpleader issue, and to take the money paid in by the claimant out of Court. In effect, he claims to get the value of the goods twice over out of the claimant's money. I think that by taking out of Court the money paid in as the value of the goods on the first occasion, he has estopped himself from claiming to be entitled in respect of the same judgment to the money paid in by the claimant as

the value of such goods on the second occasion. The result is that on this interpleader issue the claimant is entitled to succeed. It is not necessary to determine what might be the result if the judgment creditor had seized the goods a second time on another judgment.

LOPES, L.J. I am of the same opinion. I adopt as the ground of my judgment the reasoning of Wright, J., in the Court below. He there said: "I agree that by the payment into Court she (the claimant) did not acquire any property in the goods; but I think that the judgment creditor by taking out of Court the money paid in by the claimant, elected to accept the money in lieu of the goods, and was thereby estopped from afterwards denying that as against himself the goods were the goods of the claimant."

DAVEY, L.J., concurred.

Appeal dismissed.

Solicitor for execution creditor: *H. R. Jones.*
Solicitor for claimant: *F. A. K. Doyle.*

E. L.

THURSBY AND ANOTHER, APPELLANTS *v.* THE CHURCHWARDENS AND OVERSEERS OF BRIERCLIFFE-WITH-EXTWISTLE, RESPONDENTS.

1894
Feb. 16.

Local Government—Rates—Lighting Rate—Coal Mines—"Land"—"Houses, Buildings, and Property other than Land"—Poor Relief Act, 1601 (43 *Eliz. c.* 2), *s.* 1—*Lighting and Watching Act*, 1833 (3 *&* 4 *Wm.* 4, *c.* 90), *s.* 33.

Coal mines are not "land," but are "property (other than land) rateable to the relief of the poor," within the meaning of s. 33 of the Lighting and Watching Act, 1833, and are therefore liable to be rated under that section at the higher rate.

By the Lighting and Watching Act, 1833 (3 & 4 Wm. 4, c. 90), s. 33), "Owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor . . . shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act."

The appellants were owners and occupiers of coal mines in the respondents' township, and were rated to a lighting rate under the above section at the higher rate. Their property consisted entirely of underground workings, having no shaft or opening to the surface within the township, and which were not, and could not be, lighted by the lighting of the township. The

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coal was taken by underground ways into an adjoining township, where it was brought to the surface. All the pits, shafts, houses, and buildings, used in getting coal in the respondents' township, were situate in the adjoining township, where they were rated to the poor, sanitary, lighting, and other rates. The appellants had no houses, buildings, or property of a like nature, in connection with the mines in the respondents' township:—

Held, on a case stated, that, as the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 1, expressly imposes the liability to poor rates on "lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods," the specific mention of coal mines in the above enumeration excluded coal mines from the term "lands," and therefore they were "property (other than land) rateable to the relief of the poor," and were rightly assessed at the higher rate.

CASE stated for the opinion of the Court under 12 & 13 Vict. c. 45, s. 11.

The ratepayers of a portion of the township of Briercliffe-with-Extwistle, called in the case the "respondents' township," adopted the provisions of the Lighting and Watching Act, 1833 (3 & 4 Wm. 4, c. 90), with respect to lighting, and the respondents made a rate of 2*d.* in the pound for the purposes of the Act of 1833 on the owners and occupiers of property in the respondents' township.

The appellants were colliery proprietors, occupying and working mines of coal in the respondents' township, and as such were rateable to the relief of the poor in the township. In the valuation list in force in the township the net rateable value of the appellants' mines in the township was 2100*l.* By the rate appealed against the appellants were assessed and rated in respect of their mines as follows:—

No.	Name of Occupier.	Name of Owner.	Description of Property rated.	Name or Situation of Property.	Rateable Value.	Rate in the £.	
						A. at 2*d.* in the £ on Property other than Land.	B. at ¾*d.* on Land.
					£	£ *s.* *d.*	
438	Executors of J. Hargreaves	Self	Coal mines	Briercliffe	2100	17 10 0	

As appeared by the rate the appellants were rated on the higher scale, at which under s. 33 of the Act of 1833 the owners and occupiers of houses, buildings, and property (other than land) were rated in the respondents' township.

The appellants' rated premises consisted entirely of underground coal mines, 500 feet at least below the surface, and having no shaft or opening to the surface within the respondents' township. The coal gotten in the respondents' township was taken by underground ways or passages into the adjoining township and borough of Burnley, where it was brought to the surface.

All the pits, shafts, or openings to the surface, and all houses, buildings, and erections, and property of a like nature, used in connection with the getting of the coal gotten in the respondents' township, were situated in the township and borough of Burnley, where they were assessed and rated to the poor, sanitary, lighting, and other rates. The appellants had no houses, or buildings, or property of a like nature, in, or in connection with, the mines in the respondents' township. Their property in that township consisted wholly of underground workings and ways, which were not, and could not be, lighted in any way by the lighting of the township.

If the Court should be of opinion that the coal mines were liable to be rated on the higher rate chargeable by the Act of 1833, the appeal was to be dismissed, and the rate was to be confirmed.

If the Court should be of a contrary opinion, the appeal was to be allowed, and the rate, so far as regarded the appellants' coal mines, was to be reduced to 5*l.* 16*s.* 8*d.*, being two-thirds of a penny in the pound upon the rateable value of 2100*l.* (1)

Poland, Q.C. (*William Graham*, with him), for the appellants. The appellants are wrongly rated at the higher rate, for their coal mines ought to be treated as "land" within the meaning of the Lighting and Watching Act, 1833 (3 & 4 Wm. 4, c. 90),

(1) By the Lighting and Watching Act, 1833 (3 & 4 Wm. 4, c. 90), s. 33: "The overseers aforesaid shall, for the purpose of collecting, raising, and levying the rate necessary for the purposes of this Act, proceed in the same manner, and have the same powers, remedies, and privileges, as for levying money for the relief of the poor in the said parish; provided always, that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish, shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act."

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s. 33, and not as coming within the words "houses, buildings, and property other than land." Two tests have been applied in considering whether property comes within these words, namely, whether the property in question can be said to be ejusdem generis with houses and buildings, and whether the property is likely to derive benefit from the rate. Judged by either of these tests, these coal mines are clearly excluded, for nothing could less resemble houses and buildings than underground coal workings, and no kind of property is less likely to benefit by a lighting rate than deep underground coal mines, which, as is expressly found in the case, have no means of access to the surface within the respondents' township. There are three decided cases which are strongly in the appellants' favour. The first in point of date is *Reg.* v. *Southwark and Vauxhall Water Co.* (1), where it was held that a water company who occupied pipes under the surface of the soil were rateable at the lower rate as occupiers of land. In that case Lord Campbell, C.J., said: "The owners and occupiers of 'houses, buildings, and property (other than land) shall be rated to every lighting rate' thrice as high as 'owners and occupiers of land.' 'Property' here evidently means property of the same sort as houses and buildings." (2) That passage supports the first test suggested on behalf of the appellants. In the same case Erle, J., said: "Land generally includes all real property; but here it is used in the sense of land other than houses, buildings, and such property, as, being used for habitation, is most benefitted by lighting." (3) That supports the appellants' second test. The next case is *Reg.* v. *Overseers of Neath* (4), where it was held that a canal and towing-path, bridges, and a dry dock, lined with masonry, used for repairing the canal boats, ought to be rated as land. The third case is *Reg.* v. *Midland Ry. Co.* (5), where it was held that a line of railway was land within the meaning of the section, and was therefore only rateable at the lower rate. The judgments in both these cases strongly support the appellants' contention.

(1) 6 E. & B. 1008.
(2) 6 E. & B. at p. 1013.
(3) 6 E. & B. at p. 1015.
(4) Law Rep. 6 Q. B. 707.
(5) Law Rep. 10 Q. B. 389.

Castle, Q.C. (*William Mackenzie*, with him), for the respondents. The Poor Relief Act, 1601 (43 Eliz. c. 2), s. 1, imposes the poor-rate first on "lands," and then on several other classes of property, namely "houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods." The special mention of these latter classes of property shews that they are not "lands" within the meaning of that Act, for if it were otherwise the words would be superfluous. If this is so it follows that coal mines are "property (other than land) rateable to the relief of the poor," within the meaning of s. 33 of the Lighting and Watching Act, 1833, and therefore rateable at the higher rate. The decision in *Morgan* v. *Crawshay* (1), where the House of Lords held that all mines except coal mines were exempt from poor-rate, because coal mines alone are mentioned in the statute of Elizabeth, shews conclusively that coal mines are rateable to the relief of the poor, not as "lands," but because they are specially mentioned, which is equivalent to holding that they are "property (other than land) rateable to the relief of the poor." The legislature has dealt with "property other than land" in 14 & 15 Vict. c. 50, by which tithes, which are mentioned together with coal mines in the statute of Elizabeth, are made rateable under the Lighting and Watching Act at the lower rate, instead of at the higher rate, as had formerly been the case. Again by the Rating Act, 1874 (37 & 38 Vict. c. 54), passed three years after the decision in *Morgan* v. *Crawshay* (1), plantations, sporting rights, and mines of every kind not mentioned in the Act of Elizabeth, were made rateable to the relief of the poor. If other mines are not "land" a coal mine is not. None of the decisions referred to bear out the appellants' contention, and the dicta relied upon, if correct, are not applicable to the present case.

Poland, Q.C., in reply. *Morgan* v. *Crawshay* (1) is not a decision that coal mines are not "lands" within the meaning of the statute of Elizabeth, but only that other mines were excluded from the operation of that statute because coal mines are expressly mentioned. The word "lands" in its ordinary sense would include coal mines, and the other words may have been

(1) Law Rep. 5 H. L. 304.

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inserted from overcaution. The respondents' contention would do away with the doctrine of ejusdem generis, which is a doctrine of universal application.

MATHEW, J. In this case the question arises for the first time whether coal mines are rateable under the Lighting and Watching Act, 1833, at the higher or at the lower rate. The cases which have been cited in argument deal with property other than coal mines, such as water pipes, a canal and tow-path with bridges and a dry dock, a line of railway, and therefore cannot afford us any guide as to what our decision ought to be in the present case. From the words of the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 1, it is clear that coal mines are not lands within the meaning of that Act, for they are assessed separately and by name. Coal mines, therefore, were rateable under the Act of Elizabeth; but other mines not mentioned in that Act were not rateable until they were made so by the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 3. The first Lighting and Watching Act that was passed (11 Geo. 4, & 1 Wm. 4, c. 27) provided by s. 25 that, "The overseers shall, for the purpose of collecting, raising, and levying such rate, proceed in the same manner, and have the same powers, remedies and privileges, as for levying money for the relief of the poor." It is clear from those words that a coal mine was assessable under that Act. Then the section goes on: "Provided that the owners or occupiers of land situate in any parish adopting the provisions of this Act shall be assessed in the proportion of one-fourth of the rate so authorized to be demanded by the said inspectors, and the owners or occupiers of houses, buildings, and other property rateable to the relief of the poor, shall be assessed in the proportion of the remaining three-fourths of the said rate." That section makes it clear that, coal mines being assessable under the Act of Elizabeth because expressly named, a coal mine would pay at the higher rate under the first Lighting and Watching Act. That Act is repealed by the statute now before us, the Lighting and Watching Act, 1833 (3 & 4 Wm. 4, c. 90). This later Act contains a clause almost identical with that which I have read from the Act which it repeals, for by s. 33 it empowers the overseers to levy

the rate in words which are the same as those of the earlier Act. Then it goes on and describes the property to be rated at the higher and lower rates respectively as follows: "Provided always that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act." That is a clear provision that if there is in the parish property (other than land) rateable to the relief of the poor such property shall pay three times as much as land, and it follows that these coal mines, which, as I have pointed out, are "property (other than land) rateable to the relief of the poor," are liable at the higher rate. No doubt there are dicta in some of the cases which to a certain extent seem to favour the appellants' contention; but none of the cases decide the point. Our judgment must be for the respondents.

COLLINS, J. I am of the same opinion. I think it is clear that when once it is admitted that coal mines are not "lands," within the meaning of the statute of Elizabeth, they must be subject to the higher rate. It is clear, as put by Mr. Castle, that the statute of Elizabeth includes more than land, for it specifies certain kinds of property, some of which could not possibly be land. That statute expressly took coal mines out of the generic term "lands," and therefore all other mines were held to be excluded, because coal mines alone were expressly included. The Act of 11 Geo. 4 & 1 Wm. 4, c. 27, s. 25, which has been referred to, in terms stated that property (other than land) which was rateable to the relief of the poor was to be rateable under that Act on the higher scale. Then the Act which we have now to construe (3 & 4 Wm. 4, c. 90, s. 33), expressly provides that "houses, buildings, and property (other than land) rateable to the relief of the poor" shall be subject to the higher rate under that Act. It is obvious, therefore, that if something which is rateable under the statute of Elizabeth is not a house or building, and is not land, it is subject to the higher rate. Now, these coal mines are clearly not houses or buildings, and, as has been already pointed out, it has been

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Collins, J.

decided that mines are not lands within the meaning of the statute of Elizabeth, and therefore they are property other than land. The Act of 1851 (14 & 15 Vict. c. 50) deals with tithes, which were formerly rateable at the higher rate, and puts them on the same footing as land. But for the decisions which have been referred to, I think the point would be absolutely clear. But those cases relate to a canal, water pipes, a railway; and all the property dealt with in those cases was clearly capable of being land, in the sense that it was not excluded, as coal mines are, by the statute of Elizabeth. The only question was whether that which might be land might also be houses or buildings. No doubt there are dicta which seem to favour the appellants' contention, but none of the cases decide the point in their favour, and the dicta must be read secundum subjectam materiem.

Judgment for the respondents, with leave to appeal.

Solicitors for appellants: *Littledale & Lefroy, for Artindale & Southern, Burnley.*

Solicitors for respondents: *Warriner & Kinch, for T. Nowell, Burnley.*

P. B. H.

1894
Feb. 16.

SOMERSET, APPELLANT *v.* WADE, RESPONDENT.

Licensing Acts—Offences—Permitting Drunkenness on Premises—Ignorance of Licensed Person—Licensing Act, 1872 (35 & 36 *Vict.* c. 94), s. 13.

A licensed person cannot be convicted, under s. 13 of the Licensing Act, 1872, of permitting drunkenness to take place on his premises, where the evidence shews that a person who was on the premises was in fact drunk, but the licensed person did not know that such person was drunk.

Somerset v. *Hart* (12 Q. B. D. 360) approved and followed.

Bond v. *Evans* (21 Q. B. D. 249) explained.

CASE stated by justices.

The respondent, a licensed person, was charged under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 13 (1), with permitting drunkenness on his licensed premises.

(1) 35 & 36 Vict. c. 94, s. 13: "If any licensed person permits drunkenness, or any violent, quarrelsome or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding for the first offence 10*l.*, and not exceeding for the second, and any subsequent offence, 20*l.*"

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The evidence, so far as material for the purpose of this report, was as follows. A police constable stated that at 5.30 P.M. he entered the public-house kept by the respondent, where he saw and spoke to the respondent, that he found a woman on the premises drinking beer, that she was drunk, and that earlier on the same day he had turned her out of another public-house. The respondent gave evidence (1), and stated that he had believed the woman not to be drunk.

The justices were satisfied on the evidence that the woman who was found on the premises was in fact drunk, but that the respondent did not know that she was drunk, and dismissed the information.

C. E. Jones, for the appellant. The justices were wrong in refusing to convict. The words of s. 13 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), under which the respondent was charged, are: "If any licensed person permits drunkenness . . . to take place on his premises . . . he shall be liable to a penalty." The word "knowingly" does not appear in the section, which shews that proof of knowledge is not necessary in order to justify a conviction, for where the legislature intended that knowledge should be of the essence of the offence, the word "knowingly" has been inserted, as, for instance, in s. 14 of the same Act, which imposes a penalty for permitting premises to be the habitual resort of, or place of meeting of, reputed prostitutes; and in s. 16, sub-s. 1, which imposes a penalty for harbouring, or suffering to remain on premises, a constable during the time appointed for his being on duty. On the other hand, in s. 17, which is directed against suffering gaming, the word "knowingly" is omitted. This shews that the legislature intended to draw a distinction between the different classes of offences. The justices appear to have acted on *Somerset* v. *Hart* (2); but that decision is spoken of with disapproval in the later case of *Bond* v. *Evans*. (3)

(1) By 35 & 36 Vict. c. 94, s. 51, sub-s. 4: "In all cases of summary proceedings under this Act, the defendant and his wife shall be competent to give evidence."

(2) 12 Q. B. D. 360.

(3) 21 Q. B. D. 249.

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[COLLINS, J. In the latter case the servant was in charge of the premises, which makes the whole difference, as is pointed out by Stephen, J., who says, referring to *Somerset* v. *Hart* (1), "The servant who knew of the gaming was only a potman, and was not in charge of the premises, and there had been no delegation of authority to him. This is how I understand *Somerset* v. *Hart* (1), and so understood it does not seem to me to be in conflict with the other decisions." (2)]

Cundy v. *Le Cocq* (3), decided on s. 13, is an authority to shew that the prohibition is absolute, and proof of knowledge is unnecessary.

[MATHEW, J. That case turned on the later words of the section, "sells any intoxicating liquor to any drunken person." The question here is as to the meaning of the word "permits."]

To require proof of knowledge would tend to facilitate evasion of the Act, for any one might say he did not know, and in the face of such denial it would often be very difficult to prove knowledge. [He also referred to *Reg.* v. *Woodrow* (4); *Reg.* v. *Bishop* (5); *Blaker* v. *Tillstone.* (6)]

[COLLINS, J., referred to *Redgate* v. *Haynes.* (7)]

The respondent did not appear, nor did the justices.

MATHEW, J. This case is really concluded by the decision in *Somerset* v. *Hart.* (1) There it was held that where gaming had taken place on licensed premises to the knowledge of a servant of the licensed person employed on, but not in charge of, the premises, but there was no evidence of connivance or wilful blindness on the part of the licensed person, the latter could not be convicted of suffering gaming. It comes to this, that a licensed person cannot be convicted of suffering gaming, in the absence of knowledge, or connivance, or carelessness on his part. That was a case on s. 17, the words of which are, "suffers any gaming"; but the word "suffers" is not distinguishable from "permits," which is the word used in s. 13, the section now before us. In a case where the defendant does not know that the

(1) 12 Q. B. D. 360.
(2) 21 Q. B. D. at p. 256.
(3) 13 Q. B. D. 207.
(4) 15 M. & W. 404.
(5) 5 Q. B. D. 259.
(6) [1894] 1 Q. B. 345.
(7) 1 Q. B. D. 89.

person who was on his premises was in fact drunk, he cannot be said to permit drunkenness. In the present case the justices have found that the respondent did not know that the woman was drunk, and there was evidence to support that finding. Our attention was called to s. 14, and an argument was put forward based on the presence in that section of the word "knowingly," which is absent from s. 13; but in s. 14 the word "knowingly" applies to the character of the persons who are permitted to resort to the premises. Our judgment must be in favour of the respondent.

COLLINS, J. I am of the same opinion. I think that the terms of the early part of s. 13, even without the decision in *Somerset* v. *Hart* (1), would shew that the defendant must know that the person found on the premises was drunk before he can be convicted of permitting drunkenness to take place on his premises. The appellant does not contend that if a quarrel arose when the landlord was momentarily absent, and he stopped it on his return, he could be convicted under the same section of permitting quarrelsome or riotous conduct to take place. He could not be convicted, because while the quarrel went on he did not know of it, and the same observation applies here. In *Somerset* v. *Hart* (1), Lord Coleridge, C.J., said: "How can a man suffer a thing to be done when he does not know of it? It is true that a man may put another in his position so as to represent him for the purpose of knowledge; but there is no evidence of such delegation here." (2) Mr. Jones says that decision was questioned in *Bond* v. *Evans* (3); but it is clear that the judges in the latter case did not question the decision in *Somerset* v. *Hart* (1) on this point. In *Bond* v. *Evans* (3), Manisty, J., said: "In *Somerset* v. *Hart* (1) the justices refused to convict, and it was held that they were right, on the ground that there was no evidence to shew any connivance or wilful blindness on the part of the landlord, and it did not appear that the servant was in charge of the premises. In the present case it is distinctly found as a fact

(1) 12 Q. B. D. 360. (2) 12 Q. B. D. at p. 362.
(3) 21 Q. B. D. 249.

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that the appellant's servant was in charge of the skittle-alley where the gaming took place." After quoting from Lord Coleridge's judgment, he continues: "The Chief Justice certainly appears to have thought that the connivance of the landlord himself must be inferred in order to justify a conviction; but that is not so, for the other decisions to which I have referred shew that the connivance of the servant in charge of the premises is sufficient. I cannot reconcile the statements contained in this passage with the other decisions." (1) It comes to this, that Manisty, J., said that, given no delegation of authority, he agreed that the landlord could not suffer gaming within the meaning of the statute without knowing that the gaming was going on. Then we were referred to *Cundy* v. *Le Cocq* (2); but that case turned on the last words of s. 13, which were held to amount to an absolute prohibition. As to the case of an offence under s. 14, no doubt, the word "knowingly" is used; but that is because without the use of that or some similar word it might possibly be contended that if women were knowingly permitted to resort to the premises, it would be no defence that it was not known that they were reputed prostitutes. Again, in s. 16, the use of the word "knowingly" meets the case of a police constable in plain clothes, and therefore not known to be a police constable. For these reasons, I am of opinion that the decision of the justices was right.

Judgment for the respondent.

Solicitor for appellant: *W. J. Tanner.*

(1) 21 Q. B. D. at pp. 254, 255.

(2) 13 Q. B. D. 207.

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
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Feb. 8.

HURCUM *v.* HILLEARY.

Parliament—Borough Vote—Registration of Voters—Description of Qualification—Amendment of Claim—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-ss.* 2, 13.

The appellant claimed to have his name inserted in Division One of the list of voters as a parliamentary voter and burgess. The claim stated the nature of the qualification, in the third column, as "dwelling-house, successive," and described the qualifying property, in the fourth column, as two houses. It appeared that the appellant had lived in one only of such houses throughout the qualifying period:—

Held, that the qualification in respect of the occupation of one house is a different qualification from that in respect of the occupation of two houses in succession, and that the revising barrister had no power to amend the claim by omitting the word "successive" in the third, and the house in which the appellant had not lived in the fourth, column.

Foskett v. *Kaufman* (16 Q. B. D. 279) followed.

APPEAL from a Divisional Court, affirming the decision of the revising barrister for the borough of West Ham.

It appeared from the case stated by the revising barrister that C. P. Hurcum sent in a claim to have his name inserted among the parliamentary electors for the borough of West Ham in the following terms:—

Name of Claimant.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Hurcum, Charles Philip.	13, Disraeli Road.	Dwelling-house, Successive.	13, Disraeli Road, from 31, Eglington Road.

The revising barrister stated that it was proved to his satisfaction that the claimant had been for the qualifying period the inhabitant occupier as tenant of 13, Disraeli Road, and that the claim was based upon a successive occupation of that and the other house mentioned therein, in consequence of a bonâ fide mistake. He was asked to amend the claim by omitting the words "successive" and "from 31, Eglington Road," and would have

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made the amendment if he had thought he had the power, but decided that he had not the power.

The claimant appealed, and the appeal was heard by a Divisional Court (Coleridge, C.J., and Lawrance and Collins, JJ.), who affirmed the decision of the revising barrister, and dismissed the appeal. The claimant renewed the application before the Court of Appeal.

C. E. Jones, for the appellant. There is no decided case exactly in point; all the cases that have been decided have been on entries in the list, not on claims. Nor has it been expressly held that the revising barrister may not strike out unnecessary words like "successive" and the description of a second house where the occupation of one house is sufficient qualification. By the 41 & 42 Vict. c. 26, s. 28, sub-s. 1, it is enacted that the barrister "shall correct any mistake which is proved to him to be made in any list"; and by sub-s. 2, that "he may correct any mistake which is proved to him to have been made in any claim or notice of objection." Then sub-s. 12 directs the barrister, in cases where the qualification is insufficient in law for the purpose of the list in which it is inserted, but would be sufficient as a qualification in another list, to remove the name and the qualification into the appropriate list. That does not apply to the present case. Then sub-s. 13 says that, "except as herein provided, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same." It is to be observed that the word "claim" does not occur in the latter part of this sub-section. The words "except as aforesaid" refer to sub-s. 2, and leave it open to the barrister to correct a bonâ fide mistake in a claim if, in his discretion, he thinks it right: *Ford* v. *Hoar* (1); *Lynch* v. *Wheatley* (2); *Ainsley* v. *Nicholson* (3); *Reg.* v. *McKellar.* (4) In *Foskett* v. *Kaufman* (5) the question arose as to a list, and the amendment

(1) 14 Q. B. D. 507.
(2) 14 Q. B. D. 504.
(3) 24 Q. B. D. 144.
(4) [1893] 1 Q. B. 121.
(5) 16 Q. B. D. 279.

was the addition—not the omission—of words in the entry. *Plant* v. *Potts* (1) also related to a list.

Roskill, and *E. Morten*, for the respondent, were not called on.

LINDLEY, L.J. I think that this case is concluded by decisions which are binding upon us, and which in my judgment are right. The counsel for the appellant in his ingenious argument has contended that there is a material distinction between lists and claims, and that the previous cases have been decisions upon lists, and he says that by sub-s. 2 of s. 28 of 41 & 42 Vict. c. 26, the revising barrister "may correct any mistake which is proved to him to be made in any claim or notice of objection." Then he says that the prohibition in sub-s. 13, which prevents the revising barrister from altering the description of the qualification, does not apply to sub-s. 2, as that sub-section is covered by the words at the commencement of sub-s. 13, "except as herein provided." I agree that the words "except as herein provided" may as a matter of grammar apply to sub-s. 2. But if that is the true reading, it would make nonsense of sub-s. 13. Sub-s. 12 is important as throwing light upon the construction of sub-s. 13. Reading those sub-sections together, I think that the words "except as herein provided" have reference to sub-s. 12, and not to sub-s. 2. If we were dealing with a list, Mr. Jones admits that his case would be hopeless unless he could induce us to upset three or four decisions. I cannot help thinking that the true view is this, that when the revising barrister is dealing with an entry of qualification, whether in a list or claim, he may amend it if he can put the matter right under sub-s. 12, but that, subject to that and in the absence of any declaration under s. 24, he cannot make any alteration in the qualification. In *Plant* v. *Potts* (1), it was held that a revising barrister had no power to alter an alleged ownership qualification in a list from "freehold house" into "leasehold house." "Houses in succession" and "house" are different qualifications; that is settled by authority, and, that being so, I think that the view taken by the revising barrister is right, and that the appeal fails.

(1) [1891] 1 Q. B. 256.

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KAY, L.J. I am of the same opinion. In *Bartlett* v. *Gibbs* (1) it was distinctly held that the successive occupation of two houses was a different qualification from the continuous occupation of one house. And that case was followed in *Foskett* v. *Kaufman* (2), where Lord Esher, M.R., says that "a qualification in respect of successive occupation of two dwelling-houses in a borough is a distinct qualification from a qualification by reason of the occupation of a single dwelling-house." We are asked here to alter the description of the qualification. [The Lord Justice read sub-ss. 2 and 13 of s. 28 of 41 & 42 Vict. c. 26, and proceeded:—] If sub-s. 2 had stood alone, the revising barrister would have had power to do what the Court is now asked to do; but it is followed by sub-s. 13, and unless the words "except as herein provided" allow him to do so, the revising barrister cannot receive any evidence of mistake so as to alter the qualification, and the mistake cannot be proved as required by sub-s. 2. It is said that those words refer to sub-s. 2; but in my opinion they clearly refer to sub-s. 12, and not to sub-s. 2. I therefore agree that the appeal fails, and must be dismissed.

A. L. SMITH, L.J. I am of the same opinion. It was decided in *Bartlett* v. *Gibbs* (1) that the occupation of "houses in succession" constituted a different qualification from the occupation of a single house, and that decision was followed in *Foskett* v. *Kaufman*. (3) That being so, and applying the same principle to the present case, I think it is clear that it makes no difference whether words are taken away such as the word "succession" from the entry of qualification, or whether words are added thereto, and so far this case is absolutely covered by authority. But then it is said that these cases were decisions on lists, and distinction is sought to be made between a list and a claim. In my judgment, sub-ss. 12 and 13 are limitations upon the general provisions of sub-ss. 1 and 2, and in construing these sub-ss. 12 and 13 I adopt the language of Lopes, L.J., in *Plant* v. *Potts*. (4) He there says: "After careful consideration I have come to the conclusion that they empower a revising barrister

(1) 5 Man. & G. 81.
(2) 16 Q. B. D. 279, 286.
(3) 16 Q. B. D. 279.
(4) [1891] 1 Q. B. 256, 264.

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to correct an insufficient or inaccurate statement of qualification in the third column, provided such correction does not involve a change or alteration of the qualification as it appears in the list." I cannot in reading this s. 28, so far as it relates to the power of the revising barrister to make corrections, discover that there is any difference between a list and a claim. I therefore think the revising barrister was right.

Appeal dismissed.

Solicitors: *Sedgwick & Sharman; Hilleary, Town Clerk of West Ham.*

M. W.

[IN THE COURT OF APPEAL.]

C. A. 1894 *Feb.* 27; *March* 8.

KEMP *v.* WANKLYN.

Parliament—Registration—Borough Vote—Service of Notice of Objection—Production of Stamped Duplicate—"Ordinary course of post"—6 & 7 *Vict.* c. 18, *ss.* 17, 100.

Notices of objection to borough voters under 6 & 7 Vict. c. 18, s. 17, were posted in conformity with the provisions of s. 100, addressed to barracks in which the voters resided. According to the military and postal regulations, letters thus addressed are not delivered at the barracks by postmen, but are taken from the post-office to the barracks by orderlies. The notices were brought from the post-office to the barracks by an orderly on August 19, when the voters were absent in camp, and were by mistake not sent on till August 21:—

Held, that the expression "ordinary course of post," in 6 & 7 Vict. c. 18, s. 100, means the general course of post with regard to the delivery of letters to persons resident in the district; and, as in such course of post the notices would have been delivered by the post-office at the barracks on or before August 20, but for the special arrangement made with regard to persons living in barracks, due service of the notices of objection was proved by the production of duplicate notices stamped by the post-office under s. 100.

Childs v. *Cox* (20 Q. B. D. 290) overruled.

APPEAL from the judgment of a Divisional Court (Lord Coleridge, C.J., and Lawrance and Collins, JJ.) (1) upon a case stated by the revising barrister for the borough of Colchester, reported ante, p. 265, where the facts are fully stated.

Dodd, Q.C., and *Lewis Thomas*, for the appellant. The Divisional Court thought the case concluded by *Childs* v. *Cox*. (2)

(1) Ante, p. 265. (2) 20 Q. B. D. 290.

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The decision in that case was wrong. The Court misinterpreted the words "in the ordinary course of post," as used in s. 100 of 6 & 7 Vict. c. 18. They mean the general course of post in the district. It is sufficient if the notice would in such general course have been delivered by the post-office at the address mentioned on or before August 20. The fact that in the particular case such delivery has been prevented in consequence of military regulations or of some exceptional arrangement made between the military authorities and the Post Office, by which an orderly fetches the letters from the post-office, is immaterial. The objector would have no knowledge of such an arrangement, and it cannot have been intended that he should be affected by it. The "ordinary course of post" does not refer to the mode in which letters are delivered to particular persons, but the mode in which post letters are generally delivered to persons in the district. [They cited *Lewis* v. *Evans* (1); *Bishop* v. *Helps* (2); *Doogan* v. *Colquhoun* (3); *Hudson* v. *Louth.* (4)]

Morten, for the respondent, the town clerk of Colchester. *Childs* v. *Cox* (5) was rightly decided. If the objector chooses to avail himself of the provision of s. 100 for service through the post-office, he must ascertain that there is an ordinary course of post, according to which the notice will be delivered by the post-office at the address stated in time. If there is not in fact any such ordinary course of post with regard to persons living in barracks, the service will not be good under s. 100.

Cur. adv. vult.

LORD ESHER, M.R. In the Divisional Court this case was decided upon the authority of the case of *Childs* v. *Cox* (5), the facts of which were precisely similar to those of the present case We have, therefore, to consider whether we agree with that decision. The question depends on the words of s. 100 of 6 & 7 Vict. c. 18, which provides that notices of objection may be served through the post, and that production of a duplicate of the notice of objection stamped with the stamp of the post-office

(1) Law Rep. 10 C. P. 297.
(2) 2 C. B. 45.
(3) 20 L. R. (Ireland), 361.
(4) 6 L. R. (Ireland), 69.
(5) 20 Q. B. D. 290.

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shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would "in the ordinary course of post, have been delivered to such place." This is an enactment the intention of which is for the public benefit to give facilities to objectors. What we have to consider is the meaning of the words, "in the ordinary course of post." After much consideration, I have come to the conclusion that their meaning is as contended for by the appellant. The Post Office is the authority which, under its statutory powers, determines the ordinary course of the post—that is to say, how the letters shall be carried, and at what time they shall, as a general rule, be delivered within any particular district to the persons taken as a body who reside in that district. It appears to me that all the objector has to do under s. 100 is to look at the Post Office regulations, and to see whether a letter posted at the place, from which he proposes to send the notice, would, according to the ordinary course of post, be delivered to any person resident within the district to which he is posting the notice, as to whom there is no exceptional mode of delivering letters, on or before August 20. He is not bound to inquire whether within the district there may be some people who, by some special arrangement with the post-office officials there, made either with or without the authority of the Post Office, have their letters delivered in an exceptional manner. Such a special arrangement would be, not the ordinary, but an extraordinary, course of post. That being so, I think that *Childs* v. *Cox* (1) was wrongly decided. In this case there was an ordinary course of delivery in the district within which the barracks was comprised, according to which the notices would have been delivered in time by the post-office at the address of the parties objected to. In the case of the barracks, by reason of the action of the military authority, or of the Post Office, or of both, the ordinary course of delivery was replaced by an extraordinary one. With that, I think, the objector had nothing to do. On these grounds, it appears to me that the service of these notices of objection, on production of the stamped duplicates, ought to have been held good. I therefore disagree

(1) 20 Q. B. D. 290.

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with the judgment given pro formâ by the Court below, and think that the appeal must be allowed.

LOPES, L.J. In this case the revising barrister held, on the authority of *Childs* v. *Cox* (1), that there was no delivery "in the ordinary course of post" at the barracks within the meaning of s. 100 of 6 & 7 Vict. c. 18, and that the stamped duplicates were not available to prove the service of the notices of objection.

It is necessary to consider what the words "in the ordinary course of post" as used in s. 100 mean. The object of the legislature was to make the stamped duplicate retained by the objector evidence of the notice having been given. The objector had to comply with the requirements of s. 100; and the notices must have been posted so that "in the ordinary course of post" they would be delivered on or before August 20. In this case the objector had done all that was required by s. 100, and the only question was whether the notices were posted so that "in the ordinary course of post" they would be delivered on or before August 20. There was an ordinary course of post in Colchester, and it is clear, if the ordinary course of post had been permitted to take its ordinary course, the notices would have been delivered on August 20 at the barracks. The reason why they were not delivered was because, owing to some military regulation, the post was not allowed to take its ordinary course. In my judgment this cannot prejudice the action of the objector. He had done all required of him by the statute. It was no fault of his that the notices were not delivered in the ordinary course of post. A person with a private box or a private bag might give directions to the post-master to retain his letters till called for or to forward them once a week. Could it be said that an objector was to be prejudiced if his notice was not delivered in time? He could know nothing of this private arrangement. It would be sufficient for him that, if nothing had been done to delay or intercept the notices, they would, in ordinary course of post, have been delivered in time. *Childs* v. *Cox* (1) was, in my judgment, wrongly decided and ought to be reversed. The Court there says that the case shews that on August 20 no

(1) 20 Q. B. D. 290.

"ordinary course of post" existed; but that is not so. There was an "ordinary course of post," by which the notices would have been delivered in time, if nothing had been done to intercept them.

DAVEY, L.J., concurred.

Appeal allowed.

Solicitors for appellant: *Speechly, Mumford, Landon, & Rodgers, for Prior, Colchester.*

E. L.

[IN THE COURT OF APPEAL.]

EDWARDS *v.* MARCUS. TOWNEND, CLAIMANT.

Bill of Sale—Validity—Registration—Unregistered Mortgage forming Part of Contract—Condition—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 3.

A husband and wife assigned by bill of sale chattels in their dwelling-house to the claimant, to secure the payment of 300*l.* with simple interest payable by instalments. By a contemporaneous deed the wife mortgaged her reversionary interest under a will to the claimant to secure the payment of a like sum with compound interest, payable by instalments on the same days as those mentioned in the bill of sale. The bill of sale was duly registered, but the mortgage was not. Both securities were for the same debt and were given as part of the same transaction:—

Held, that the agreement in the mortgage to pay compound interest was a condition that ought to have been written on the same paper as the bill of sale before registration; and that the bill of sale was void under the Bills of Sale Act, 1878, s. 10, sub-s. 3.

In considering whether a defeasance or condition is within the above-mentioned sub-section, it makes no difference whether it is in favour of the grantor or the grantee.

Dictum of James, L.J., in *Ex parte Collins* (Law Rep. 10 Ch. 372), disapproved.

Counsell v. *London and Westminster Loan and Discount Co.* (19 Q. B. D. 512) followed.

APPEAL by the claimant in interpleader proceedings against the decision of a Divisional Court (Lawrance and Wright, JJ.) upon a special case.

The claimant claimed as grantee under a bill of sale made by Frances Adelaide Marcus and her husband, Lewis Marcus, goods

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which had been seized in execution upon a judgment recovered against the grantors.

By a bill of sale made on January 5, 1892, Frances Adelaide Marcus and her husband, Lewis Marcus, assigned to the claimant, J. F. Townend, certain goods and chattels in their dwelling-house by way of security for the payment of 300*l.* and interest at 75*l.* per cent. By this bill of sale, which was in the form prescribed by the schedule to the Bills of Sale Act, 1882, the defendants, therein called the mortgagors, agreed to pay the principal sum and interest by instalments of 56*l.* 5*s.* on the fifth day of each month, the first instalment to be paid on April 5, 1892, and the balance on January 6, 1893. On the same day a mortgage deed was executed whereby Mrs. Marcus, therein called the mortgagor, covenanted to pay to the claimant Townend, therein called the mortgagee, the sum of 300*l.* together with interest at the rate of 75*l.* per cent. per annum by the following instalments: 56*l.* 5*s.* on the fifth day of every third month, the first of such instalments being due on April 5, 1892, and the balance owing being payable on January 6, 1893, such instalments and payments in the first place to be appropriated by the mortgagee in and towards satisfaction of the amount agreed upon from interest as aforesaid; and also that in case any one or more of such instalments should not be paid on the day or days respectively appointed for payment of the same, then the mortgagor would, so long as such instalment or instalments should remain unpaid, pay interest thereon at the rate of 75*l.* per cent. per annum. The mortgagor then assigned to the mortgagee her reversionary interest under the wills of P. Marriott and S. A. Holt, with a proviso that, if and as soon as all money therein before covenanted to be paid was duly paid accordingly, the assignment should become void.

The bill of sale and the mortgage were given on the same day and to secure one and the same debt, and the bill of sale and mortgage respectively were both given as part of the same transaction.

The bill of sale was duly registered, but the mortgage was not registered.

On July 20, 1892, one of the instalments not having been

paid, the claimant, acting under the powers of the bill of sale, seized and took possession of the goods and chattels comprised therein. The goods having been afterwards taken in execution by the plaintiff, the sheriff interpleaded. The question raised by the special case for the opinion of the Court was whether the goods and chattels seized by the sheriff were the property of the claimant as against the execution creditor.

The Divisional Court held that it was not possible to distinguish the case from *Counsell* v. *London and Westminster Loan and Discount Co.* (1), and gave judgment for the execution creditors. The claimant appealed.

Jelf, Q.C., and *Bonner*, for the appellant. The proviso in sub-s. 3 of s. 10 of the Bills of Sale Act, 1878, on which the execution creditor relies, enacts that "if the bill of sale is made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance condition or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration." But in the present case the mortgage does not contain any defeasance or condition or declaration which affected in any way the bill of sale. It was a collateral security on a totally different property, and stands as a separate contract; although, no doubt, it was to secure the same debt. The conditions contained in it did not interfere with or operate as a defeasance of the bill of sale. It could never have been intended by the legislature that no collateral security should be given for a bill of sale: *Carpenter* v. *Deen* (2); *Heseltine* v. *Simmons* (3); *Goldstrom* v. *Tallerman*. (4)

Channell, Q.C., and *H. Kisch*, for the respondents. It must be taken as true, as stated in the special case, that both documents formed part of the transaction and were to secure the same debt. That brings the case entirely within *Counsell* v. *London and Westminster Loan and Discount Co.* (1) It is not true that the conditions in the mortgage did not operate as a defeasance to the bill. In the mortgage deed compound interest was payable, and,

(1) 19 Q. B. D. 512.
(2) 23 Q. B. D. 566.
(3) [1892] 2 Q. B. 547.
(4) 18 Q. B. D. 1.

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if the property was sold under the mortgage, the debt would be gone and the bill of sale would be defeated: *Simpson* v. *Charing Cross Bank.* (1) In *Carpenter* v. *Deen* (2) the bill of sale and the policy of insurance do not appear to have formed one transaction.

Jelf, Q.C., in reply. The condition or defeasance referred to in the Act means something which cuts down the rights of the grantee in the bill of sale: *Ex parte Collins.* (3) In the present case the conditions respecting compound interest did not have that effect, but gave him additional rights.

LINDLEY, L.J. This case is not free from difficulty. The difficulty arises from the form in which the transaction has taken place. In January, 1892, the defendant, Marcus, and his wife gave a bill of sale to the claimant, Townend, to secure 300*l.* with simple interest at the rate named. That bill of sale was registered. On the same day Mrs. Marcus gave a mortgage to Townend of some reversionary interests of hers, and that mortgage was to secure the same debt with interest at the same rate, but compound interest instead of simple interest. It appears that the bill of sale and mortgage were given on the same day and to secure one and the same debt, and the bill of sale and mortgage were both given as part of the same transaction; that is to say, one bargain, one debt, but two instruments—one, as I say, making the goods and chattels mortgaged redeemable on the payment of 300*l.* with simple interest, and the other making the property of the wife redeemable on the payment of the same sum with compound interest. There has been a judgment obtained against both husband and wife, and the sheriff under a fi. fa. has seized. The chattels comprised in the bill of sale have been taken in execution under a judgment against the grantors, and the question is whether the bill of sale is good as against the execution creditors.

Having heard the arguments and the different authorities which have been cited, I am of opinion that this bill of sale is bad. It is impossible to disregard the fact that the bill of sale and the mortgage were given on the same day to secure

(1) 34 W. R. 568. (2) 23 Q. B. D. 566.
(3) Law Rep. 10 Ch. 367, 372.

the same debt and interest. What does that mean? It means this, that notwithstanding what is said in the bill of sale, the bill of sale does not contain the conditions on which the borrowers of the money were to discharge their indebtedness. According to the bill of sale they would get rid of their indebtedness by paying the 300*l.* and interest, whereas by the true bargain between them they could do nothing of the kind. Certainly the wife could not, because she is made liable to pay compound interest, and therefore her liability is not truly stated in the bill of sale, but is stated in another document which is not referred to. How does that affect her right? In the face of this finding that the bill of sale and mortgage were given for the same debt, which she could not get rid of except by the payment of the 300*l.* and interest, it seems to me to follow that she could not get possession of the chattels except upon payment of the principal money and compound interest. I do not say that the husband could not. He is no party to the mortgage. The real effect of the finding of the learned referee in the special case is plain enough, and it seems to me that this case is exactly hit by the 10th section of the Act of 1878.

It has been argued that the construction which we are putting upon this is erroneous. The 10th section of the Act of 1878, sub-s. 3, runs thus: "If the bill of sale is made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance condition or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void." The effect of making the registration void is not to avoid the whole bill of sale, but simply to make it void with respect to the goods comprised in it. The effect of that is plain enough. Mr. Jelf has pressed us with the decision of the Court of Appeal in *Ex parte Collins* (1), and he has called our attention to the observations made by James, L.J., on a similar clause in the Act of 1854; the Lord Justice certainly expressed his opinion that a condition must be a condition

(1) Law Rep. 10 Ch. 367.

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affecting the interest of the donee. But when you come to look at that case, it is obvious that the document there was not a condition at all, and I do not doubt that that decision was perfectly correct. The controversy there was this: The view taken by Bacon, V.C., was that as the loan was made on a condition, that was a condition within the meaning of the section; but James and Mellish, L.JJ., held that that was not a condition at all; that is plain from the passage at the end of the judgment, where the Lord Justice says: "I am of opinion that the title of the appellant does not depend upon the memorandum, and that his rights are not affected by its being unregistered." On the question whether the condition must be something prejudicially affecting the position of the donee, I confess it seems to me to be putting words into the section. That is not the true meaning. Any condition, whether it is prejudicial to one party or to the other, seems to be within the mischief struck at, and that was the view taken by the Court in *Counsell* v. *London and Westminster Loan and Discount Co.* (1). *Ex parte Collins* (2) was not cited in that case; but when you see that the document was not a condition and would not affect the title of the donee, that case does not conflict in any way with the later case. Here, if I am right in the view which I take, the title of the grantors is most prejudicially affected, because the grantee can hold these chattels until he is paid his principal and compound interest. Therefore, I think the case is brought within the section. Looking at the matter as men of business the result is that you cannot split the bargain and put into the bill of sale what is allowed by the statute, and what is not allowed into the contemporaneous mortgage. I think the appeal must be dismissed.

KAY, L.J. It was decided in the case of *Heseltine* v. *Simmons* (3), in the Court of Appeal, that s. 9 of the Act of 1882 does not contain anything which requires accuracy of statement or representation or a statement of the whole bargain in the body of the bill of sale. Those two matters are provided for

(1) 19 Q. B. D. 512. (2) Law Rep. 10 Ch. 367.
(3) [1892] 2 Q. B. 547.

by different sections in the Acts of 1878 and 1882, and the section which does hit this particular case is the one which Lindley, L.J., has referred to, namely, sub-s. 3 of the 10th section of the Act of 1878. Now, as to bills of sale given by way of security for money, the effect of the registration being void is the subject of s. 8 of the Act of 1882, by which the bill of sale is made void in respect of the personal chattels comprised therein. So that if this bill of sale was made or given subject to a condition which is not written on the same paper or parchment, the effect is that it is void so far as the chattels comprised in it are concerned. What, then, is the meaning of the words in sub-s. 3 of the 10th section of the Act of 1878, "Made or given subject to a condition defeasance or declaration of trust not contained in the body thereof"?

Suppose the defeasance in the bill of sale were less in favour of the grantee than the actual defeasance agreed on, so that it did not represent the real defeasance, it could not be denied that in that case sub-s. 3 would apply, and that the bill of sale would be void. If that is so with regard to the word "defeasance," what is the case with regard to the word "condition"? Condition may mean something either in favour of the grantee or of the grantor. Why should this word import a condition in favour of one party rather than the other? The actual defeasance on the bill of sale may be less in favour of the one or the other than the omitted defeasance. So, as to a condition: the condition may be a condition in favour of the grantor or the grantee. I confess I think the language attributed to James, L.J., in his judgment in the case of *Ex parte Collins* (1) is too narrow a construction of this Bills of Sale Act. The real object was, as I understand it, intended to be this: If the bill of sale is given subject to a condition which is not expressed on the face of it, it does not matter in whose favour that condition is; whether in favour of the grantor or grantee, that bill of sale does not express the true contract between the parties, or the terms on which the chattels were to be redeemable, and, therefore, the bill of sale is hit by this section, and is void as to the chattels comprised in it. Now, that is exactly in conformity

(1) Law Rep. 10 Ch. 367, 372.

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with the later decision in *Counsell* v. *London and Westminster Loan and Discount Co.* (1), in which it is said the case of *Ex parte Collins* (2) was not cited. But if you look at *Ex parte Collins* (2) you will find that what was omitted in the bill of sale was not a condition at all. The bill of sale was for 130*l.*, payable by certain instalments. Of that sum of 130*l.* the whole was not advanced—in fact only 100*l.*, and the 30*l.* was added as interest, and it was included in the instalments that had to be paid. The grantee was afraid that if the money was paid at once, the grantor notwithstanding the terms of the bill of sale might be able to say, "I will only pay you 100*l.*, because no interest is due," and, therefore, a memorandum was signed between the parties making the 130*l.* payable, although the sum might be paid before any interest became due. Under the bill of sale the 30*l.* was payable just as much as the 100*l.*, and was to be paid as much as any part of the whole amount. The precautionary memorandum provided that the 30*l.* was to be paid, although no interest became due. This was not a condition differing from the bill of sale, and, therefore, the language of the learned judge must be treated as an obiter dictum, because it was not essential to the decision of the case, which proceeded on the ground that the memorandum did not embody any condition which was not included in the bill of sale.

In *Counsell* v. *London and Westminster Loan and Discount Co.* (1) the facts were different. In that case a bill of sale had been given, and it was in accordance with the form in the schedule to the Act of 1882, and duly registered, and by it certain chattels were assigned in order to secure a principal sum of 80*l.* and interest at 30 per cent, the principal sum to be paid, together with interest then due, by equal monthly payments of 5*l.* 6*s.* on specified days until the whole sum and interest should be fully paid. At the same time the grantor gave a promissory note bearing the same date as the bill of sale, promising to pay the grantees the sum of 95*l.* 12*s.* by equal monthly instalments of 5*l.* 6*s.* on the same days as the monthly payments in the bill of sale until the whole sum of 95*l.* 12*s.* should be fully paid; and the note contained a stipulation that in case default was made in

(1) 19 Q. B. D. 512. (2) Law Rep. 10 Ch. 367, 372.

payment of any one of the said instalments the whole of the said 95*l.* 12*s.* remaining unpaid should become due and payable. That would include the whole debt due under the bill of sale, and thereupon the whole bill of sale would become inoperative, and the effect of paying the promissory note might be to bring about a defeasance of the bill of sale; but the promissory note did not interfere with the proviso for redemption contained in the bill of sale itself, and therefore it seems to me that the correct mode of treating that case is to treat that provision in the promissory note—namely, that if any of the instalments due under the promissory note should not be paid at the time stipulated for these payment of the whole sum should thereby become due—as not in any sense a defeasance of the bill of sale, but as a condition of the payment of the debt secured by the bill of sale which ought to have been included in the bill of sale. That was entirely in favour of the grantee of the bill of sale. If the grantor made default in any one of the instalments, he at once became liable for the whole debt, and therefore it was a condition which ought to have been on the face of the bill of sale, and not being there the bill of sale was void. I see no difference in principle between the present case and *Counsell's Case.* (1) Here you have a condition. I think it is a condition properly so-called—a condition that the debt which is one and the same debt shall not be repaid in certain events without payment of compound interest. That is a condition of the discharge of the debt. It is one contract, one transaction, and two documents have been prepared. In the one document that condition appears. The document in which Mrs. Marcus mortgages certain property of her own contains one condition, and that condition would not be performed although all the conditions in the other document were performed; for the other document, prepared the same day, to which the wife and the husband were both parties—I mean the bill of sale mortgaging the chattels belonging to the husband and the wife—does not contain that condition, nor any notice of it. And yet that condition was a part of the terms on which the debt, which was one and the same debt, was to be repaid. I think, therefore, this case comes

(1) 19 Q. B. D. 512.

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exactly within the terms of s. 10, sub-s. 3, of the Bills of Sale 1878, and that the bill of sale ought to have contained that condition. The effect of its not containing it is that the registration of the bill of sale, as it was a security for money, is void under s. 8 of the Amendment Act of 1882, and the consequence follows which is given in the last few words of that section: "Such bill of sale shall be void in respect of the personal chattels comprised therein." I think, therefore, the decision of the Court below is right, and that the appeal should be dismissed with costs.

A. L. SMITH, L.J. If it was not for the passage in the judgment of James, L.J., in *Ex parte Collins* (1), I should have had no difficulty in this case. The question arises between two money-lenders, and therefore the balance of equity is about even. I see that Edwards, the plaintiff, trades as the Union Deposit Bank, and he appears to have a judgment for money lent. He puts the sheriff in on the premises of his debtors, and the other money-lender, Townend, comes forward and claims the goods on the premises as his under a bill of sale. If there had been no other document than that bill of sale, he would have been all right; but the execution creditor protested that the claimant's title did not rest solely upon the bill of sale, because there was another agreement made contemporaneously therewith which vitiated the title under the bill of sale. These matters coming before the judge at chambers, a special case was stated between the parties, and it is obvious that the real contest is this—What was the effect of the second document, the mortgage, upon the bill of sale?

It has been argued that the bill of sale, on the face of it, was in order, and as it was a document in writing, no evidence could be given outside of it. I wish to point out that this point, although it would apply to other documents, is not applicable to a question arising under the Bills of Sale Act, and in *Madell* v. *Thomas* (2) it was so decided by this Court. Lord Esher, M.R., there said: "In the case of *In re Watson* (3) we had to consider

(1) Law Rep. 10 Ch. at p. 372. (2) [1891] 1 Q. B. 230, 232. 25 Q. B. D. 27.

the true construction of the Bills of Sale Acts, and whether those Acts did not oblige the Court to do, with regard to certain documents, that which but for those Acts they might have no power to do—namely, to go behind the document, and ascertain the true nature of the transaction between the parties." That being the law, the question arises as to what was the true contract between the grantors and the grantee. The special case finds that the mortgage and the bill of sale were executed on the same day, and that they were made to secure the same debt, and that they were both given as part of the same transaction; so that as I read it, the claimant has one contract in two documents; and if that be the finding, it comes exactly within what was said by this Court in *Counsell* v. *London and Westminster Loan and Discount Co.* (1), that if there is one contract in two documents, and there is anything in either which sins against the Bills of Sale Act, the contract in two documents cannot stand, and the bill of sale must be set aside. Lord Esher, in the case referred to, says that such a contract as the present does sin against the Bills of Sale Act; because, when the one contract in the two documents is read, there is a condition in the contract which does not appear in the bill of sale. It seems to me, therefore, that this case is plain down to this point. But it was argued that the sub-section relied on only applied when the condition was one which prejudicially affected the donee, and that this was the opinion of James, L.J., in *Ex parte Collins* (2), on the construction of the Act. It is true that that case was not cited in *Counsell* v. *London and Westminster Loan and Discount Co.* (1); but in the last-mentioned case the Court of Appeal held a condition to be within the Act, which, I think, cannot be distinguished from the condition in the present case.

When, therefore, I am faced with the difficulty of the judgment given by James and Mellish, L.JJ., I have, on the other hand, the decision of this Court, which came to the conclusion that a condition similar to that which we have in this case is within the meaning of the Act, and which judgment I prefer; and, what is more, I have the decision of Cotton, L.J., in *Carpenter* v. *Deen* (3),

(1) 19 Q. B. D. 512. (2) Law Rep. 10 Ch. 367.
(3) 23 Q. B. D. 566.

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in which that learned Lord Justice took no exception to the decision in *Counsell's Case*. (1) I think that this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Victor Thomasset.*

Solicitors for respondent: *Holdsworth & Payne.*

M. W.

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[IN THE COURT OF APPEAL.]

WEARDALE COAL AND IRON CO., LIMITED *v.* C. W. HODSON. A. E. HODSON, CLAIMANT.

Bill of Sale—Construction of Covenants—Covenant for Payment of Interest annually on amount of Loan—Payment of Instalments reducing amount of Loan—Production of Receipt for Rent, Rates, and Taxes—Bills of Sale Act 1878 *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.

A bill of sale, given to secure money lent, contained a covenant by the grantor to pay the principal sum by equal yearly payments until the whole of the principal sum and interest was fully paid, and also a covenant to pay interest "on the said sum" at a given rate per annum, payable quarterly. The deed also contained a covenant to produce, on demand in writing, the last receipts for rent, rates, and taxes, followed by a proviso that the chattels should not be liable to seizure for any cause other than those specified in s. 7 of the Bills of Sale Act, 1882, which were set out in the deed:—

Held, that the covenant as to payment of interest must be construed to refer to interest on the amount of principal due from time to time:

Held, also, that the covenant to produce receipts must be read with the qualification contained in sub-s. 4 of s. 7 of the Act, that the goods could only be seized if the failure to produce the receipts should be without reasonable excuse.

APPEAL from a judgment of the Queen's Bench Division on appeal from a county court.

By a bill of sale goods and chattels on certain premises, and specified in a schedule to the bill of sale, were assigned by way of security for the payment in the manner thereinafter appearing of the sum of 150*l.* and interest thereon at the rate of 4 per cent. per annum, and the grantor of the bill of sale further agreed and declared that he would duly pay to the grantee the principal sum aforesaid, by equal yearly payments of 30*l.*, on May 20,

(1) 19 Q. B. D. 512.

1893, and on May 20 in each succeeding year, until the whole of the principal and interest was fully paid, and would also pay to the grantee interest on the said sum of 150*l.* at the rate of 4 per cent. per annum, such interest being payable by quarterly payments on August 20, November 20, February 20, and May 20 in each year, the first being payable on August 20, 1892, and the grantor also agreed that he would during the continuance of the security keep the chattels and things insured against loss or damage by fire in the sum of 150*l.*, and also would during the continuance of the security duly and regularly pay the rent, rates, and taxes payable by him in respect of the premises, and produce to the grantee upon demand in writing the last receipts for such rent, rates, and taxes, provided always that the chattels and things thereby assigned should not be liable to seizure, or to be taken possession of by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882, which were set out, one of them being, "(4.) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes," provided further that if the said chattels and things thereby assigned should be seized or taken possession of by the grantee in consequence of the breach of any of the covenants therein contained, the grantee should be at liberty to remove or sell the same or any part thereof by public auction or private contract at the expiration of five clear days from the day of such seizure or taking possession. The county court judge held that the bill of sale was void, as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882.

On appeal the Divisional Court (Charles and Wright, JJ.) affirmed his decision.

Herbert Reed, Q.C., and *Edmondson*, for the claimant. The bill of sale is in substantial accordance with the form, as it does not differ therefrom in legal effect. The provision as to payment of interest obviously means that interest should only be payable on so much of the principal as remains from time to time owing. The covenant to produce receipts for rent, rates, and taxes is necessary for the maintenance of the security. The bill of sale

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provides expressly that the goods shall not be subject to seizure except in the events specified in s. 7, and therefore incorporates the condition as to a reasonable excuse for non-production of receipts for rent, rates, and taxes. The final proviso does not enlarge the power of seizure, but only provides that, when that power has been exercised, the goods may be removed or sold in accordance with s. 13 of the Act. [They cited *Davis* v. *Burton* (1); *Hammond* v. *Hocking* (2); *Watkins* v. *Evans* (3); *Furber* v. *Cobb* (4); *Calvert* v. *Thomas* (5); *Haslewood* v. *Consolidated Credit Co.* (6); *Turner* v. *Culpan* (7); *Simmons* v. *Woodward.* (8)]

Jelf, Q.C., and *Frank Gover*, for the judgment creditors. The bill of sale is not to the same legal effect as the form in the schedule, or at best it is so ambiguous that an ordinary person could not tell whether it was so or not. In either case it is not in accordance with the form. The covenant to produce receipts is unqualified. The final proviso gives a power of seizure beyond that given by the Act, for it imports a power to seize for breach of any of the covenants in the bill of sale, and, therefore, to seize for non-production of a receipt for rent, rates, or taxes, although there may be reasonable excuse for such non-production; or at any rate, a person reading it might naturally so construe it. The bill of sale in terms provides for the payment of 4 per cent. interest on 150*l.* as long as any of the principal or interest remains due. Further, no definite time is limited for payment of the instalments. By the terms of the bill the payment of 30*l.* yearly is to continue until the principal and interest is fully paid, so that so long as any interest is unpaid the payment of instalments is to be continued. [They cited *Melville* v. *Stringer* (9); *Hetherington* v. *Groome* (10); *Ex parte Stanford, In re Barber* (11); *Blaiberg* v. *Parsons* (12); *Blaiberg* v. *Beckett* (13); *Ex parte Official Receiver, In re Morritt.* (14)]

(1) 11 Q. B. D. 537.
(2) 12 Q. B. D. 291.
(3) 18 Q. B. D. 386.
(4) 18 Q. B. D. 494.
(5) 19 Q. B. D. 204.
(6) 25 Q. B. D. 555.
(7) 58 L. T. 340.
(8) [1892] A. C. 100.
(9) 13 Q. B. D. 392.
(10) 13 Q. B. D. 789.
(11) 17 Q. B. D. 259.
(12) 17 Q. B. D. 336.
(13) 18 Q. B. D. 96.
(14) 18 Q. B. D. 222.

LORD ESHER, M.R. The whole question before us depends on what is the true construction of the bill of sale. The proper mode of dealing with the case is to consider what is the meaning of the document according to the ordinary canons of construction. When that has been done, the document so construed must be compared with the Act to see if it is in accordance with its provisions. If it is not in accordance with them, the bill of sale is void and bad. Now, in construing this document in this manner, we have first to take into consideration that it is a contract as to a loan of money and security for its repayment. We must give to the language used the ordinary sense that business men would give to it. The ordinary view of a business man would be that the payment of interest on money borrowed is to be made in respect of that money so long as it is unpaid, and no longer. In this view the covenant to pay interest on a sum of money which is repayable by instalments would be to pay interest on the amount remaining unpaid at any given time. The strict grammatical construction may be that for which Mr. Jelf contends; but the business meaning is that which I have stated, and that is the meaning that must be given to the covenant. It is remarkable that while we are pressed with the strict grammatical construction to shew that this deed is not in accordance with the Act, the form itself in the Act discloses the same ambiguity.

As to the covenant to produce the receipts for rent and taxes, the words in the covenant relating to this matter are general and unqualified. But the covenant does not stand alone, and cannot be read independently of the proviso. The whole deed, so far as this matter is concerned, must be read with the restriction contained in the proviso which expresses the limitation required by the Act; and that being the construction to be put on the covenant, the deed is not contrary to the provisions of the Act.

Then it is said that the proviso as to seizure for breach of any of the covenants applies to the unrestricted covenant for the production of receipts, and is consequently too large. But the covenants referred to are the covenants agreed on by the parties, and the agreement between them on this point of receipts is qualified, as I have already pointed out, by being limited to non-production without reasonable excuse.

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I come, therefore, to the conclusion that the bill of sale is good, and that the appeal should be allowed.

LOPES, L.J. I am of the same opinion. I entirely agree that in construing the bill of sale it must be read independently of the Act, and as an assignment of chattels to secure the repayment of money. Having ascertained the meaning of the deed, it then remains to determine whether its provisions are in accordance with the Act. It is said, in the first place, that there is a covenant in the bill of sale to produce to the grantee, upon demand in writing, the last receipts for rent, rates, and taxes, without any limitation with regard to a reasonable excuse for non-production. Is that the correct way to read the deed? In my opinion it is not, for the covenant is governed by the proviso that the chattels are not to be seized for any cause other than those specified in s. 7 of the Act, and it is therefore qualified by sub-s. 4 of that section, which provides for seizure for non-production of receipts only in case such non-production is without reasonable excuse. If that is the legal effect of the deed, the difficulty vanishes, and there is nothing in this respect which deviates from the statutory form of the Act. In so holding the deed to be valid we are following the decision in *Ex parte Stanford, In re Barber*. (1) The further objection that an ordinary person reading this deed would not understand it, but would require legal assistance, is disposed of by Cotton, L.J., in *Haslewood* v. *Consolidated Credit Co.* (2), where it is pointed out that what the Court has to determine is the true construction of the bill of sale.

Another suggestion was that the time for the ceasing of the payment of the instalments is uncertain. It is sufficient for me to say that I do not agree with this contention.

That a covenant during the continuance of the security to pay rent, rates, and taxes is a covenant necessary for maintaining the security, seems to me to be clear from the case of *Furber* v. *Cobb*. (3) An objection has also been taken to the covenant to pay interest on 150*l*. by quarterly payments. It is suggested

(1) 17 Q. B. D. 259.
(2) 25 Q. B. D. 555, at p. 564.
(3) 18 Q. B. D. 494.

that, consistently with the words of the covenant, interest would be payable on 150*l.* for the whole duration of the security, although the amount of principal had been reduced by the payment of one or more instalments. That argument is entirely disposed of by the remarks of Lindley, L.J., in *Haslewood* v. *Consolidated Credit Co.* (1) "Everybody," said the Lord Justice, "must bring to a bill of sale a knowledge of the ordinary principles of borrowing and lending. If I borrow 50*l.*, and promise to repay it with interest at 5 per cent. or 60 per cent., or at any other rate, the interest accrues and is payable only in respect of so much of it as is not paid." I am aware that the words in the two cases are not the same, but the highest view which the counsel for the execution creditors can put before us, is that the words in this case are ambiguous; but that also is dealt with by Lindley, L.J., who says: "to put a construction upon an instrument of loan which will impose upon the borrower an obligation to pay interest upon money which has been already repaid is, to say the least, to put upon such a document an unreasonable construction . . . . it is not the reasonable construction of a document, even if it is ambiguous." I will only add that this objection as to interest would apply with equal force to the form in the Act the words of which are "by way of security for the payment of the sum of £——, and interest thereon." There is no qualification expressed as to the interest being payable on the amount due from time to time, although the possibility of payment by instalments is indicated in the form itself.

I think that the objections to this bill of sale have failed, and that the appeal must be allowed.

DAVEY, L.J. I agree, and in my opinion this is a very plain case.

We have to construe this deed apart from the Bills of Sale Act, in the same manner as we should construe any other document; and having done so, we have to inquire whether the deed so construed is in accordance with the provisions of the statute.

We have, however, been invited to construe the deed according

(1) 25 Q. B. D. 555, at p. 566.

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WEARDALE COAL AND IRON CO. v. HODSON.

Davey, L.J.

to some standard which has been put forward as that of an unlettered person. I do not understand how such a standard is to be applied, and the propriety of attempting to apply any such standard was disposed of once for all by Cotton, L.J., in *Haslewood* v. *Consolidated Credit Co.* (1)

With regard to the production of receipts for rent, rates, and taxes, a covenant that the grantor would do so on demand is obviously one to which the parties might agree for the maintenance of the security. Such a covenant provides the means of ascertaining whether the grantor by any default on his part has put the security in peril. The further argument on this point is so refined and subtle that I cannot grasp it, though it appears to me to depend on reading the first covenant as to this matter without the proviso which immediately follows it. I must, for my part, decline to imply the larger right of seizure in defiance of the stipulation which restricts the right. As to the amount secured, I cannot conceive how it can be fairly argued that the grantor can be called on to pay more than the principal sum of 150*l.* by annual instalments of 30*l.*

As to the interest which is payable according to an ordinary and business-like construction, it must be interest on the money from time to time due. Interest on a sum of 150*l.*, repayable by instalments, is interest on so much of that 150*l.* as is from time to time due, and no person, whether a lawyer or a layman, or whether lettered or unlettered, could think otherwise, and, as has been pointed out, the ambiguity, if there be one, arises equally on the form given in the Act.

I agree that the appeal must be allowed.

Appeal allowed.

Solicitor for judgment creditors: *C. W. Dommett.*
Solicitors for claimant: *James & James.*

(1) 25 Q. B. D. 555.

A. M.

IN RE WOOD. EX PARTE WOOLFE.

1894
Feb. 20.

Bill of Sale—Operation—Payment by Instalments—Power to seize—Default in Payment of one Instalment—Right to seize whole of Property—Bills of Sale Act, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.

A bill of sale made the amount secured, and interest, payable by monthly instalments, but there was no express provision entitling the grantee to seize the whole of the goods on default in payment of one instalment. An instalment being in arrear, the grantee, after demand of payment, seized the goods. A receiving order was shortly afterwards made against the grantor, and the official receiver claimed the goods, which were sold by arrangement, the proceeds to abide the order of the Court.

A county court judge having refused to order that the proceeds of the sale should be paid to the grantee:—

Held, on appeal, that the seizure was rightful, and the grantee in consequence of the default in payment of one instalment became entitled to possession of the whole of the goods, and therefore an order for payment to him of the proceeds of the sale must be made.

Lumley v. *Simmons* (34 Ch. D. 698) explained.

Myers v. *Elliott* (16 Q. B. D. 526) distinguished.

APPEAL by the holder of a bill of sale from the decision of the judge of the county court at Derby, refusing the appellant's application for an order directing that the official receiver should pay over to the appellant the proceeds of the sale of the goods comprised in the bill of sale.

The bill of sale was dated March 4, 1893, and recited that Wood, the grantor, owed Woolfe, the grantee, 30*l.*, and that Woolfe had agreed to advance 37*l.* more, and assigned the chattels specified in the schedule as security for the payment of 67*l.*, and interest at 5 per cent. per month; and the grantor agreed to pay the principal sum and interest by instalments of 10*l.* per month for the first six months, and 6*l.* per month afterwards, but so that the whole should be paid at the expiration of ten months. There was a proviso that the chattels should not be seized for any other cause than those specified in s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882. There was no express provision making the whole sum payable on default in payment of any one instalment.

A monthly instalment of 10*l.* being in arrear, on April 17,

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1893, the grantee demanded payment, and on April 19 he seized the goods. On April 21 a receiving order was made against the grantor. The official receiver claimed the goods, and offered to pay 10*l.* The goods were sold by arrangement, the proceeds to abide the order of the Court. The county court judge held that the grantee was not entitled to either the amount of the overdue instalment of 10*l.*, which the official receiver had offered to pay, or the remainder of the proceeds of the sale. The grantee appealed.

Herbert Reed, Q.C. (*W. B. Yates*, with him), for the appellant. The judgment in the county court was wrong, for the appellant is entitled to the proceeds of the sale of the goods. The county court judge took an erroneous view of the effect of the decision in *Lumley* v. *Simmons*. (1) That case only decides that a bill of sale containing a clause, by which on default in any payment when it becomes due, the whole of the principal unpaid and the interest then due shall be at once payable, is valid. It does not affect the right to seize under such a bill of sale as this. No question was raised in the present case as to the validity of the bill of sale, which is clearly good. The case comes within the words of the first of the causes of seizure allowed by s. 7 of the Act of 1882, "if the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment." The proviso in s. 7, by which "the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court or to a judge thereof in chambers, and such Court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just," is wholly inapplicable; for, in the first place, no application was made under that proviso; and, secondly, it is impossible to say here that, by payment of money or otherwise, the cause of seizure no longer exists. In consequence of the default in payment of the instalment, the appellant was entitled to seize the whole of the

(1) 34 Ch. D. 698.

goods. *Johnson* v. *Diprose* (1) in effect decides the question in the appellant's favour. *Myers* v. *Elliott* (2) is distinguishable, for the ground of the decision in that case was that the bill of sale was void because a lump sum of 15*l.* was made payable for interest and bonus, and, as Stirling, J., said, in *Lumley* v. *Simmons* (3), "the decision was grounded on the fact that a bonus was included in the interest."

The official receiver did not appear.

VAUGHAN WILLIAMS, J. I am of opinion that the order of the county court judge was wrong. On the admitted facts, there was a rightful seizure on April 19, and immediately thereupon, by reason of the prior default in payment, the right of the grantee to immediate possession had arisen, and the whole of the effects comprised in the bill of sale was his property. That proposition is involved in the decision in *Johnson* v. *Diprose*. (1) No right to redeem can exist in this case, unless on payment of the whole amount due. It is true that, by s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882, the grantor of a bill of sale has a right to obtain an order restraining the grantee from removing or selling the chattels; but I think that provision is not applicable to the present case at all, and if it were applicable it would be necessary to consider the circumstances before an order could properly be granted. Now, the circumstances here are that the grantor becomes bankrupt, and the trustee takes over all his property. I cannot think that those circumstances are such as should induce the Court to say that, by payment of money or otherwise, the cause of seizure no longer exists. Under the circumstances of the present case, the right of the grantee was absolute. As to the decision in *Myers* v. *Elliott* (2), I am of opinion that the account of that case given by Stirling, J., in *Lumley* v. *Simmons* (4), is accurate. He said: "The same principle was applied in *Myers* v. *Elliott* (2), where a bill of sale given to secure repayment of a sum of money, together with 15*l.* for agreed interest and bonus thereon, making in all 130*l.*, to be paid by monthly instalments of 10*l.* 16*s.* 8*d.*, was held void; but

(1) [1893] 1 Q. B. 512.
(2) 16 Q. B. D. 526.
(3) 34 Ch. D. at p. 701.
(4) 34 Ch. D. 698.

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the decision was grounded on the fact that a bonus was included in the interest. I do not fail to observe that the dicta went much further, and that the Court held that, even if the whole 15*l.* were to be regarded as interest, the bill of sale would have been void." (1) The judgment of Stirling, J., was affirmed by the Court of Appeal, and I have no doubt that the Court of Appeal took the same view of *Myers* v. *Elliott* (2) as Stirling, J., took.

WRIGHT, J. I am of the same opinion. The grantor could not redeem except on payment of the whole sum due. Under ordinary circumstances, a debtor would be entitled to redeem by virtue of s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882; but that is not so in the present case.

Appeal allowed.

Solicitor for appellant: *John Holbrook, Derby.*

P. B. H.

1894

Feb. 23, 26.

BODEN *v.* ROSCOE.

Distress—Damage Feasant—For what Damage Things may be Distrained.

The damage in respect of which trespassing animals may be distrained damage feasant is not confined to damage to the freehold, but includes injuries to other animals.

APPEAL from county court of Cheshire.

The plaintiff and defendant were occupiers of adjoining fields, and through a defect in the defendant's fence a pony of the defendant escaped into the plaintiff's field and kicked a filly of the plaintiff. The plaintiff distrained the pony damage feasant, and, finding that his filly had been seriously lamed by the kick, demanded 5*l.* damages. The demand not being complied with, the plaintiff, while still retaining possession of the pony under the distress, brought an action in the county court to recover damages for the injury to the filly, and also nominal damages for the injury to the grass. At the hearing the defendant contended that the plaintiff could not whilst retaining the distress bring an

(1) 34 Ch. D. at p. 701. (2) 16 Q. B. D. 526.

action for the damage done. The judge held the objection good so far as it applied to the damage to the grass, but bad as regarded the damage to the filly, and in respect of the latter damage he awarded the plaintiff 10*l*. The defendant appealed.

Macmorran, for the defendant. Trespassing animals are distrainable in respect of all damage that they may do whilst trespassing. And it is settled law that the party distraining such animals cannot while he retains the distress bring an action to recover any damage in respect of which the animals were lawfully distrained: *Vaspor* v. *Edwards* (1); *Lehain* v. *Philpott*. (2) The county court judge drew a distinction in that respect between the damage done to the plaintiff's freehold and that done to his chattel. But the two classes of damage are undistinguishable.

[MATHEW, J. Suppose the pony had kicked the plaintiff himself, would that have been a damage for which it would have been distrainable?]

It is submitted that it would.

Collingwood Hope, for the plaintiff. The right of distress damage feasant is limited to damage to the freehold or the crops produced by it. In Bullen on Distress (p. 227) it is said that, "As to the instances in which this distress may be made, it may be said generally to be a remedy applicable wherever anything animate or inanimate is upon land doing damage *thereto, or to its produce*." In Gilbert on Distress it is said (at p. 21) that "This remedy (distress damage feasant) is not confined simply to the owner of the soil on which the cattle may be found, but extends to those who may be injured by their being thereon as commoners and others entitled to the produce of the land." And, again (at p. 24), he says: "Cattle may be distrained damage feasant, not only for the injury which they may do to the pasture or herbage of the land, but for damage of any other kind, as by the lord of the soil, although he may not have an interest in the herbage, for there may be other damage besides eating the grass, as by destroying plants or trees in which the interest of the lord still continues." These passages suggest that the right is

(1) 12 Mod. 658. (2) Law Rep. 10 Ex. 242.

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limited to cases of injury to the soil itself or its produce. In Addison on Torts, 7th ed. p. 399, it is said that "Every occupier of land has a right to seize animals and chattels trespassing upon and doing damage to his *land*, and to detain them until he is tendered or paid a fair compensation for the injury." It is believed that in none of the text-books is any passage to be found suggesting that the rule is otherwise than as contended by the plaintiff.

[CAVE, J. In Rolle's Abridgment, tit. Distres. A, the following propositions are laid down: 1. "Un leverer poet estre prise dammage feasant currant apres les conyes en un garren. 2. Issint home poet prendre un ferret que un auter ad port en son garren, et ad prist conies ove ceo." But the damage done by the greyhound or the ferret is done, not to the soil, but to the rabbits. (1)]

Those passages do not conflict with the plaintiff's contention, and for two reasons: In the first place, they merely say that the animals in question may be distrained, which is not disputed, for their mere wrongful presence on the plaintiff's land, incumbering it, is itself a damage in legal contemplation. Thus a ferret might be distrained if found trespassing in a paved yard, though it could not possibly do any damage there beyond the nominal damage which is technically involved in every trespass. Neither of the passages in terms says that the animals can be detained until tender of amends for the damage to the rabbits. And, secondly, even if those passages are to be read as meaning that, wild rabbits are the produce of the soil, which a horse cannot be said to be.

Macmorran, in reply.

MATHEW, J. I am of opinion that this appeal must be allowed. The researches of counsel have failed to bring to light any other authorities bearing upon the question than those cited in Rolle's Abridgment, and referred to by Cave, J., in the course of argument, to the effect that greyhounds or ferrets

(1) The reference to the passage in the Year Book, cited by Rolle as an authority for this proposition, is wrongly given by him, as also by Fitzherbert, from whom he seems to have copied it. It should be 1 Edw. 2, 18, pl. 2.

chasing and killing rabbits in a warren may be distrained damage feasant. Those authorities seem to me to sufficiently establish Mr. Macmorran's proposition, that the damage in respect of which trespassing animals may be distrained damage feasant is not confined to damage to the freehold, but extends to all kinds of damage done by such animals whilst trespassing, including injuries to animals belonging to the distrainor. The plaintiff in the case before us, then, was entitled to distrain for the damage to his filly as well as for the damage to the grass, and it is clear that it was mainly for the former class of damage that he did in fact distrain. That being so, it is plain upon the authorities that while he continues to hold the distress he cannot bring an action for any part of the damage distrained for.

CAVE, J. I am of the same opinion. There is no doubt that the plaintiff intended to distrain the pony for the damage to the filly. The only question is, whether it could legally be distrained for such damage. It is laid down distinctly in Rolle's Abridgment, that you may distrain damage feasant anything animate or inanimate which is wrongfully on the land of the distraining party and is doing damage there, whatever the nature of the damage may be. It is there said that you may not only distrain a greyhound running after rabbits in a warren, but also ferrets or nets which a man has brought into the warren, and has been using for the purpose of catching the rabbits. The plaintiff's distress, therefore, was a valid distress in respect of the damage to the filly, and it was not disputed that if that were so, his right to recover that damage by action was suspended so long as the distress continued. There must be judgment for the defendant.

Appeal allowed.

Solicitors for plaintiff: *Hamlin, Grammer, & Hamlin, for J. P. Cartwright & Sons, Chester.*

Solicitor for defendant: *F. B. Mason, Chester.*

J. F. C.

C. A.
1894
March 1.

[IN THE COURT OF APPEAL.]

HANSEN *v.* HARROLD BROTHERS.

Ship—Charterparty—Lump Freight—Cesser Clause—Charterer's Liability to Cease on Cargo being Loaded—Bill of Lading Freight not equal to Lump Freight—Absence of Lien for Full Freight, Effect of.

By a charterparty, by which a ship was chartered at a lump freight for carriage of a cargo of oats from New Zealand to London, it was provided that the charterers might recharter the ship at any rate of freight without prejudice to the charterparty, the captain to sign bills of lading according to the custom of the port at the current or any rate of freight required without prejudice to the charterparty. The charterparty contained a clause by which the liabilities of the charterers were "to cease on the vessel being loaded, the master and owners having a lien on the cargo for all freight and demurrage under this charterparty." The charterers rechartered the ship. Under the sub-charter a cargo of oats was shipped, and a bill of lading given, by which freight was payable in London at a certain rate per ton on the weight of the cargo as delivered. By reason of a diminution in weight of the cargo during the voyage, the amount of the bill of lading freight, for which the shipowner had a lien, did not wholly cover the amount due for lump freight under the charterparty. The shipowner sued the charterers to recover the difference:—

Held, on the authority of *Clink* v. *Radford* ([1891] 1 Q. B. 625), that the cesser clause only relieved the charterers from liability to the extent to which the shipowner had obtained a lien for the freight on the cargo, and, therefore, the charterers were liable.

Appeal from the judgment of Day, J., at the trial before him without a jury.

The plaintiff's claim was for the sum of 195*l.* 13*s.*, balance of 4000*l.* agreed freight on a charterparty, or alternatively, for the same sum as damages for breach by the defendants of such charterparty.

The facts, so far as material, were as follows. The defendants had chartered a ship of the plaintiff's for carriage of a cargo of oats, and/or other lawful produce, and/or merchandize from Invercargill, in New Zealand, to London, for a lump sum of 4000*l.* for freight expressed to be payable on the delivery of the cargo. By the terms of the charterparty it was provided that the charterers were "to have the privilege of rechartering the vessel at any rate of freight, without prejudice to this agreement,

and the captain to sign bills of lading (Australian and New Zealand trade) for the cargo according to the custom of the port at the current or any rate of freight required, without prejudice to this charterparty; and, should the freight-list according to bills of lading shew a less sum in the aggregate than chartered freight, the difference to be paid in cash prior to the ship's clearance at the custom-house, and if more than chartered freight, the same to be indorsed on the bill of lading and/or charterparty as an advance against freight (free of commission), if so required by charterers or their agents." The charterparty also contained the following clause: "The liabilities of charterers to cease on the vessel being loaded, the master and owners having a lien on the cargo for all freight and demurrage under this charterparty."

The defendants exercised their privilege of rechartering the vessel. Under the sub-charter a cargo of oats was shipped, and a bill of lading was given by the captain, by which freight for the said goods was payable in London at the rate of 37*s.* 6*d.* per ton of 2240 lbs. gross weight delivered. The bill of lading did not refer to the charterparty. The freight-list according to the bill of lading shewing a less sum than the chartered freight, the defendants paid to the plaintiff at the port of loading the difference, amounting to the sum of 532*l.* 12*s.* 9*d.* It appeared that in the case of cargoes of oats shipped from New Zealand to England, there is a diminution in weight during the voyage amounting on an average to $2\frac{1}{2}$ per cent. In the present case there was a diminution in weight to the amount of $5\frac{2}{3}$ per cent. Consequently, on the discharge of the cargo its weight was less than at the time of loading and the bill of lading freight only amounted to 3271*l.* 14*s.* 3*d.*, making, with the 532*l.* 12*s.* 9*d.* paid in Invercargill, a total amount of 3804*l.* 7*s.*, the difference between which sum and the chartered freight of 4000*l.* was the amount sued for in the action. The learned judge gave judgment for the plaintiff.

Bigham, Q.C., and *T. G. Carver* (*Schjott*, with them), for the defendants. The object with which the cesser clause was introduced into charterparties was to free charterers in England from

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the various obligations of the charterparty subsequent to the loading of the cargo, which might have to be performed abroad at places where the charterers might have no houses or representatives, and to limit their liability to the point when the loading is complete. This object will be defeated if, in a case like this, the charterer remains liable in respect of a matter arising subsequently to the loading. The meaning of such a cesser clause is what it says in terms, viz., that the liability of the charterers is to cease when the vessel is loaded, and in respect of any subsequent liability the shipowner must look to his lien on the cargo: *French* v. *Gerber*. (1) The words "the master and owners having a lien, &c.," do not import a contract by the charterers to procure them any particular lien, but only a statement that the shipowners are content to rely on the lien. *Clink* v. *Radford* (2) and other cases no doubt shew that the scope and extent of the cesser of liability must be determined with reference to the lien mentioned in the second part of the cesser clause; but that is the lien contemplated by the charterparty, not the lien that may actually come into existence under the bill of lading. In *Clink* v. *Radford* (2) the reason for the decision was that the word "demurrage" in the lien clause did not cover damages for detention at the port of loading. The charterparty must be construed as at the time when it is made, and not according to the events which may subsequently happen.

The shipowner, through his captain, was himself responsible for the fact that the lien on the cargo did not cover the balance of the chartered freight. The captain was to sign bills of lading at any rate of freight, "without prejudice to the charterparty." He was therefore entitled to insist, and ought to have insisted, on having inserted in the bill of lading some such words as "all other conditions as per charterparty," which would give a lien on the goods shipped in respect of the balance of the charterparty freight not covered by the bill of lading freight: see *Arrospe* v. *Barr*. (3) It was therefore the fault of the shipowner's servant that he had no lien for the amount which he is claiming.

(1) 2 C. P. D. 247. (2) [1891] 1 Q. B. 625.
(3) 8 Court Sess. Cas. 4th Series, 602.

[They also cited *Rodoconachi* v. *Milburn* (1); *Restitution Steamship Co.* v. *Pirie.* (2)]

H. F. Boyd, and *Balloch,* for the plaintiff. The captain was bound by the charterparty to sign the bill of lading presented to him in the form usual in the Australian and New Zealand trade. The words "without prejudice to the charterparty" do not mean that he can and must insist on the bill of lading incorporating the terms of the charterparty, but merely that, whatever bill of lading he signs, it shall not affect the contract contained in the charterparty as between the shipowner and charterers: see *Shand* v. *Sanderson* (3); *Gledstanes* v. *Allen.* (4) Assuming that the words "all other conditions as per charterparty" were inserted in the bill of lading, they could not operate to incorporate anything inconsistent with the bill of lading contract, or give a lien for a greater amount of freight than the bill of lading freight: see *Gardner* v. *Trechmann* (5); *Fry* v. *Chartered Mercantile Bank of India, &c.* (6)

The principle established in *Clink* v. *Radford* (7) is that the extent of the cesser of liability depends upon the extent of the lien which the shipowner obtains. Inasmuch as such a shrinkage in weight always occurs in a cargo of oats on a voyage such as was here in question, it follows that, if the defendants' contention is correct, the shipowners must always incur a loss in such a case as this, and, therefore, there would be a cesser of liability in respect of a matter for which no corresponding lien was given, which would be contrary to the principle of *Clink* v. *Radford.* (7) All the cases as to the cesser clause are consistent with the view that the charterers' liability is to cease only on condition and to the extent that a corresponding lien is given. If the creation of such a lien is not a condition precedent to the cesser of liability, at any rate the latter part of the clause must be read as amounting to a contract to procure a lien co-extensive with the liability that is to cease. *French* v. *Gerber* (8) must be considered as having turned on the special

(1) 18 Q. B. D. 67.
(2) 64 L. T. 491.
(3) 28 L. J. (Ex.) 278.
(4) 12 C. B. 202.
(5) 15 Q. B. D. 154.
(6) Law Rep. 1 C. P. 689.
(7) [1891] 1 Q. B. 625.
(8) 2 C. P. D. 247.

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facts of that particular case. Much of what Bramwell, L.J., said in that case cannot since *Clink* v. *Radford* (1) be considered as law. *Restitution Steamship Co.* v. *Pirie* (2), so far as it is inconsistent with *Clink* v. *Radford* (1), cannot be regarded as a binding authority.

T. G. Carver, in reply. *Clink* v. *Radford* (1) only summarized the cases as to the effect of the cesser clause with regard to liability for breaches of the charterparty at the port of loading. The only case which relates to breaches subsequent to the loading is *French* v. *Gerber*. (3) If the cesser of liability is only co-extensive with the lien for freight and demurrage, that would leave the charterers liable in respect of many matters subsequent to the loading not covered by the lien for freight and demurrage, which is obviously contrary to the scope of the clause. The contention for the plaintiff logically carried out involves that, as a condition of the cesser of their liability, not only must the charterers obtain for the shipowner a lien co-extensive with the liability, but that that lien must become effective. In that case, if by some accident happening on the voyage, the lien never became effectual, the charterers would remain liable. This cannot be the intention. [He cited *The Teutonia*. (4)]

LORD ESHER, M.R. In this case the plaintiff, who is the owner of a ship, sues the defendants as charterers for the balance of a lump sum of 4000*l*., agreed to be paid for the use of the ship for the carriage of such cargo as the charterers might choose to load from New Zealand to London. The charterparty contains a stipulation that the charterers are to have the privilege of rechartering the ship at any rate of freight without prejudice to the charterparty, and the captain is to sign bills of lading (Australian and New Zealand trade) according to the custom of the port at the current or any rate of freight required without prejudice to the charterparty. The charterparty also contains a stipulation that the charterers' liability is to cease on

(1) [1891] 1 Q. B. 625.
(2) 64 L. T. 491.
(3) 2 C. P. D. 247.
(4) Law Rep. 3 A. & E. 394; 4 P. C. 171.

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the vessel being loaded, the master and owners having a lien on the cargo for all freight and demurrage under the charterparty. We have to construe the different parts of this contract having regard to the other parts of the contract dealing with the same subject-matter. The stipulation that the freight should be a lump sum of 4000*l.* primâ facie imports a contract to pay such portion of that sum as might not have been paid in accordance with the terms of the charterparty at the port of loading, when the ship arrived at the port of discharge. A stipulation for the cesser of the liability of the charterers as soon as the cargo is loaded, if it stood alone, would be entirely in favour of the charterers, and is one which, it is obvious, the shipowner would not agree to, unless it were coupled with something else, viz., that the master and owners were to have a lien on the cargo for the charterparty freight. Taking the two branches of the clause together, what is their true construction? They must be construed according to the rule laid down in *Clink* v. *Radford.* (1) It is futile now to say to this Court that there were observations, or dicta, or even decisions, before that case which are not consistent with the principle there laid down. It is the last decision of this Court on the subject, and we cannot overrule it even if we were disposed to do so. I think that it was a right decision based upon sound mercantile reasons. I said in that case: "In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charterparty is that the Court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion; in other words, it cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he had stipulated for in another part of the contract." Bowen, L.J., said: "There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability without providing for any terms of compensation to the shipowner; but such a contract would not

(1) [1891] 1 Q. B. 625.

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be one we should expect to see in a commercial transaction. The cesser clauses, as they generally come before the Courts, are clauses which couple or link the provisions for the cesser of the charterer's liability with a corresponding creation of a lien. There is a principle of reason which is obvious to commercial minds, and which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of responsibility which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability." Fry, L.J., said: "The rule that we are primâ facie to apply to the construction of a cesser clause followed by a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is simply this, that the two are to be read, if possible, as co-extensive. If that were not so, we should have this extraordinary result: there would be a clause in the charterparty the breach of which would create a legal liability: there would then be a cesser clause destroying that liability: and there would then come a lien clause which did not recreate that liability in anybody else." It seems to me that this reasoning has not been and cannot be answered. Therefore the proposition is true that, where the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charterparty the charterers are enabled to create, is not equivalent to the liability of the charterers. Where, in such a case, the provisions of the charterparty enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charterparty, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability. The question is, What in this case is the lien which can be insisted on by the shipowner? The charterparty provides that the captain is to sign bills of lading (Australian and New Zealand trade) according to the custom of the port at the current or any rate of freight that may be required without prejudice to the charterparty. It was argued that that enabled the captain to say that he would not sign bills

of lading unless they in terms gave him all the rights which are given by the charterparty—that the words "without prejudice to the charterparty" entitled the captain to insist, and he ought to have insisted, on the insertion in the bill of lading of the words "all other conditions as per charterparty." The meaning of the words "without prejudice to the charterparty" has been settled by decisions which cannot be questioned. The meaning, as settled by the cases of *Shand* v. *Sanderson* (1) and *Gledstanes* v. *Allen* (2), is that it is a term of the contract between the charterers and the shipowners that, notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered. Therefore, in this case the captain was bound to sign the bill of lading presented to him; but his doing so was to be "without prejudice to the charterparty." These words do not limit the obligation under the charterparty to sign the bills of lading presented to him; but when he has done so it does not affect the contract contained in the charterparty. If a shipowner puts up a ship as a general ship, he may insist on a bill of lading in any terms he pleases, or he may refuse to take the goods. Here the shipowner deprives himself of that right and agrees to sign bills of lading as presented; but that is not to affect the charterparty. Therefore the captain was bound to sign the bill of lading which he did. The shipowner in this case has put it into the power of the charterers to recharter the ship and to allow the sub-charterer to make any stipulation he pleases as to the rate of freight in the bill of lading, and accordingly, the charterers exercising that power, the bill of lading freight has been made by the sub-charterers payable according to the weight of the cargo delivered at the port of discharge, which necessarily made the bill of lading freight not equivalent to the balance of freight payable under the charterparty. Consequently, if the defendants' contention were correct, the lien for freight would not be coextensive with the liability given up by the cesser clause. But according to the principle laid down in *Clink* v. *Radford* (3), on the true construction of that clause, it only relieves the charterers from so much of their liability under the charterparty

(1) 28 L. J. (Ex.) 278. (2) 12 C. B. 202.
(3) [1891] 1 Q. B. 625.

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as is co-extensive with or equivalent to the lien given to the shipowner. In this case, therefore, as, by the act of the charterers, the bill of lading freight was not equivalent to so much of the chartered freight as remained due after the payment made at the port of shipment, the cesser clause does not relieve the charterers, but leaves them liable for what is not covered by the lien under the bill of lading.

LOPES, L.J., concurred.

DAVEY, L.J. The argument for the defendants has failed to carry conviction to my mind. I am not going to say whether all the cases on the cesser clause are reconcilable, still less to attempt to reconcile them. I think that we may decide the present case without going counter to any of the earlier authorities. The general principle applicable, where the cesser clause is connected with the provision as to lien as in the present case, is laid down in *Clink* v. *Radford*. (1) I will not repeat what has been cited from the judgments in that case, but it appears to me that Bowen, L.J., put the principle to be applied on grounds that were logically as well as commercially sound. I will adopt for the purpose of argument the view contended for by the defendants' counsel, viz., that the intention is that the liabilities of the charterer shall cease when the vessel is loaded, and that there shall be in the place of them a lien for all freight and demurrage under the charterparty. We must however, remember the principle laid down by Bowen, L.J., in *Clink* v. *Radford* (1), viz., that where in a clause such as this there are linked together a provision as to cesser of liability and a corresponding provision as to lien, according to legal construction and grammar the two ought to be read as correlative provisions. It is to be observed that the words "the master and owners having a lien, &c.," do not create a lien; the lien arises subsequently on the goods shipped, and could only in this case come into operation when the vessel was rechartered. There are no goods on which a lien can be created at the time of the execution of the charterparty, and, so far as concerned the

(1) [1891] 1 Q. B. 625.

shippers, such a lien could not be created on their goods by the contract between the shipowner and the charterers. The words, therefore, do not themselves create a lien, but point to a lien to be created hereafter. They import, in my opinion, a contract to give or procure a lien. I should myself think it a reasonable construction to hold that the creation of a lien was a condition precedent to the cesser of liability, the effect being that the liability of the charterers would only be discharged in so far as it was replaced by the lien. I do not desire, however, to rest my judgment on that ground, because it is not the view adopted in the earlier cases, and it is not necessary to adopt it for the purpose of this case. It is sufficient to say that the two branches of the clause thus linked together form correlative stipulations. Then whose fault is it that the shipowner in this case has not got the lien for which he stipulated? The defendants' counsel says that it is the captain's fault, and he bases his argument in that respect on the Scotch case of *Arrospe* v. *Barr*. (1) Notwithstanding some of the dicta attributed to the Lord President in that case, I do not regard it as an authority for the proposition that the master could have and ought to have refused to sign the bill of lading presented to him, unless words were inserted in it which would have the effect of incorporating all other provisions of the charterparty except that as to the rate of freight. I do not think that the case is an authority for more than this, viz., that except so far as the rate of freight is concerned he ought not to sign any bill of lading which contains provisions at variance with the charterparty. I am not prepared to say, if the captain had insisted on having created by the bill of lading a lien in favour of the shipowner, not only for the bill of lading freight, but also for the charterparty freight, that such a stipulation would have been consistent with the obligation to grant a bill of lading at any or (it may be) a lower rate of freight. Whether that be so or not, I am of opinion that it must be taken to be the fault of the charterers that the lien which they contracted in the charterparty to create or procure for the shipowner was not created or procured. If they elected to recharter the ship, they might have made a

(1) 8 Court Sess. Cas. 4th Series, 602.

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stipulation with the sub-charterers that they should create or procure such a lien as the charterparty contemplated. The master was, in my opinion, guilty of no negligence or default in signing the bill of lading which he signed. I think the charterers made default in not making such arrangements with the sub-charterers and through them with the actual shipper as to procure such a lien. The result is, that, the bill of lading freight only covering a portion of the charterparty freight, there is no lien to secure that portion of the charterparty freight which was not covered by the bill of lading freight; and, whether the case is put on the ground of condition precedent or on the ground of breach of contract for which the damages are the difference between the two freights, the result is the same. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *William A. Crump & Son.*
Solicitors for defendants: *Stokes, Saunders, & Stokes.*

E. L.

C. A. 1893 *Dec.* 4.

[IN THE COURT OF APPEAL.]

NEW ZEALAND GOLD EXTRACTION COMPANY (NEWBERY-VAUTIN PROCESS), LIMITED *v.* PEACOCK.

Company—Amalgamation—Sale of Undertaking—Call—Ultrà vires—Death of Shareholder—Executors—Notice—Address.

A limited company was empowered by its memorandum of association to sell its undertaking for shares or securities of any other similar company, or for any other consideration. The company sold their undertaking, and in accordance with one of the terms of the sale called up their unpaid capital and paid the amount to the purchasing company:—

Held, that the call was not ultrà vires.

The memorandum and articles of association of a limited company empowered the company to make calls, fourteen days' notice to be given of any such call, and to serve the notice upon any member of the company either personally or through the post by letter addressed to such member at his registered address. No provision was made as to the service of notice upon the representatives of a deceased member. After the death of a member, the company made a call upon his shares, and gave notice thereof through the post by a letter addressed

to him, which did not reach his executors (who did not know that he had been a member), and was returned to the company marked "Gone away":—

Held, that under the circumstances the call had been properly made, and that there had been sufficient notice of the call, and that the executors, upon being informed that the testator was a member of the company and of the making of the call, were liable to pay such call out of his assets.

Per Davey, L.J.: A deceased member of a limited company remains a member of the company, for the purposes of the articles of association, so long as his name remains on the register without notice to the company of his death.

APPEAL from Kennedy, J.

This was an action by the voluntary liquidator of the above-named company (hereinafter called the New Zealand Company) against the executors of John Thomas Peacock, deceased, to recover the sum of 190*l.*, being the amount of an unpaid call of 10*s.* per share made in respect of 380 shares held by him as a member of the company.

In October, 1887, a company called the Newbery-Vautin (Patents) Gold Extraction Company was registered with the object of purchasing the rights, property, and assets of two other Newbery-Vautin gold extraction companies, and of carrying on the general business of extractors of metals and miners, and with power to grant licences, and acquire land, buildings, and property, to amalgamate with any other company having similar objects, and to sell and dispose of its own property either for money, or shares, bonds, or debentures.

In December, 1887, the New Zealand Company was registered, and its objects, as stated in the memorandum of association, were to acquire and work the Newbery-Vautin patents in New Zealand, to acquire mining property, and to work mines.

The 7th, 11th, and 12th clauses of the memorandum of association gave the company the following powers:—

"7. To amalgamate, unite, or co-operate, either generally or to or for any limited extent or period, determinable, continuous, or otherwise, with any corporations, companies, or persons already or hereafter to be established for or engaged in objects which are or shall be within the scope of the objects of this company; and to purchase or acquire the business, or any interest in the business, or in any branch of the business carried on by any

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such corporation, company, or persons, and being a business which this company is authorized to carry on, and for any such purpose to make and enter into any contracts, agreements, or arrangements, and to undertake any liabilities."

"11. To sell the undertaking of the company or any part thereof for shares, debentures, or securities of any other company having objects altogether or in part similar to those of this company, or for any other consideration which the company may think fit."

"12. To do all such things as are incidental or conducive to the attainment of the above objects, or any of them."

By the articles of association the company were empowered to make calls; fourteen days' notice was to be given of any call, specifying the time and place of payment and to whom such call should be paid, and article 133 was as follows:—

"A notice may be served by the company upon any member whose registered place of address is in the United Kingdom, either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of address."

The articles further contained provisions for the forfeiture of shares for non-payment of calls, and for transfers of shares by the representatives of deceased members either to such representatives themselves, or to other persons; but they contained no provision that a notice to the representatives of a deceased member should be valid if left at his registered address, or sent by post addressed to him thereat. The objects of the New Zealand Company, in the view taken by Kennedy, J., were similar to, though not so wide in area and scope, as those of the Newbery-Vautin (Patents) Gold Extraction Company.

Mr. John Thomas Peacock, who was the registered holder of 380 1*l.* shares in the New Zealand Company, on which 10*s.* per share had been paid up, died on February 15, 1889, having made a will whereby he appointed the defendants his executors. But until September, 1892, his executors did not know that he held any shares in the New Zealand Company, and the New Zealand Company did not know of his death.

In January, 1892, the directors of the New Zealand Company

resolved to recommend to their shareholders the amalgamation of their company with the Newbery-Vautin (Patents) Gold Extraction Company, Limited, and in order to carry out this scheme they, on January 7, 1892, entered into an agreement with the latter company, the material provisions of which were shortly as follows. The New Zealand Company were to convene a meeting of their shareholders to approve of the agreement, and were to call up the remaining 10*s.* per share upon the 20,000 shares of their company by instalments. The Newbery-Vautin Company on their part undertook to convene a meeting for the purpose of passing the necessary special resolutions, and it was a term of the agreement that the call of 10*s.* per share was to be made by the New Zealand Company before the special resolutions were passed by the Newbery-Vautin Company. In the event of the agreement being duly confirmed by the shareholders of both companies, the New Zealand Company agreed to sell and transfer, and the Newbery-Vautin Company agreed to purchase, "all and singular the patents, goods, chattels, moneys, credits, debts, and things in action, including all amounts due and to become due for calls on the shares of the New Zealand Company, and the undertaking, business, and goodwill thereof, and other the assets of the New Zealand Company."

By the 7th clause of the agreement the Newbery-Vautin Company agreed to allot and issue to the New Zealand Company, or the liquidators thereof or their respective nominees, 47,500 shares in the capital of the Newbery-Vautin Company, credited as fully paid up, viz., one fully paid-up share of 1*l.* for every two shares held by any member in the New Zealand Company, and one fully paid-up share of 10*s.* for every single share.

The agreement was duly confirmed, and the special resolutions were duly passed and confirmed by the shareholders of both companies, and on February 1, 1892, the directors of the New Zealand Company made a call of 10*s.* per share payable by four instalments of 2*s.* 6*d.* each on March 1, April 18, June 20, and September 19, 1892.

For the purpose of carrying out the amalgamation, a resolution for a voluntary winding-up was duly passed and confirmed by extraordinary general meetings of the shareholders of the New

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Zealand Company held on April 6 and 28, 1892, and Mr. Hollick was appointed liquidator. Notice of the call was given to Mr. Peacock, in accordance with article 133, through the post, by letter addressed to him at his registered address; but the letter enclosing the notice was returned through the post to the company with the words "Gone away" marked on the outside.

The New Zealand Company did not know of the death of Mr. Peacock until early in September, 1892, and, on the 3rd of that month, Mr. Hollick, the liquidator, who was in communication with the solicitors of the defendants with reference to certain other shares, wrote a letter to them in which he enclosed the notice sent to Mr. Peacock and returned through the post, called their attention to the liability on the 380 shares standing in his name in respect of the call of February, 1892, and applied to them for payment thereof.

The notice sent to Mr. Peacock's address had not reached the executors, and until the receipt of this letter they were not aware that he had any shares in the New Zealand Company. A correspondence took place, and the defendants declined to pay the call, upon the ground that it was ultrà vires, and that no proper notice of it had been served upon them.

The liquidator then brought this action, and it was tried before Kennedy, J., without a jury, on June 23, 24, and 26.

Channell, Q.C., and *C. Mitchell*, for the plaintiffs.
Jelf, Q.C., and *Eustace Smith*, for the defendants.

Cur. adv. vult.

1893. Aug. 12. KENNEDY, J. (after stating the facts of the case). In my opinion, the call in respect of which this action was brought was duly made by the resolution of the directors of the plaintiff company on February 1, 1892.

The argument of the learned counsel for the defendants upon this, the main matter argued in the case, was, shortly, that the call made by the directors of the plaintiff company in pursuance of the agreement was ultrà vires, because the scheme itself, for the carrying out of which it was made, was not one which was authorized by the company's memorandum of association; that

the scheme was an amalgamation and not a sale, and that as an amalgamation it was not authorized by clause 7 of the memorandum because some of the objects for which the Newbery-Vautin Co. was established were objects which were not within the scope of the objects of the plaintiff company; that it was not a sale authorized by clause 11 of the memorandum; and that, if it was a sale within clause 11, it was ultrà vires so far as it included these moneys, because as regards them it was a sale of uncalled capital. Reliance was placed especially upon the decision of Lord Cairns, L.C., and other members of the Court of Appeal, in the case of *Clinch* v. *Financial Corporation*. (1)

After the best consideration which I have been able to give to this case, I am unable to concur with the view for which the defendants contend on this point. It appears to me that this call was a call made for one of the authorized purposes of the company. It may be doubtful, I think, whether the scheme for the purpose of effecting which the call was made is an amalgamation within clause 7 of the plaintiff company's memorandum. I am inclined to think that the object of that clause is, as Mr. Channell suggested, to authorize the acquisition by the plaintiff company of the business of some other company, corporation, or firm. But I am of opinion that the scheme was a sale within clause 11. A sale is surely none the less a sale because it also may be an amalgamation—a word which, as pointed out by Lord Hatherley in *In re Empire Assurance Corporation* (2), and by Lindley, L.J., in his work on Companies (5th ed.), p. 891, has acquired no technical or well-defined legal meaning. If the scheme is a sale within clause 11, then the call was, as it seems to me, a call made for one of the purposes authorized by the company's memorandum of association, and it is not ultrà vires.

Clinch v. *Financial Corporation* (1) does not appear to be an authority precluding me from holding as I do in this case. The question there was as to the validity of an amalgamation, but an amalgamation which, if it could be supported at all, could be supported only under the 161st section of the Companies Act of 1862. It was, as Lord Cairns states in his judgment, admitted

(1) Law Rep. 4 Ch. 117. (2) Law Rep. 4 Eq. 347.

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in the argument, and indeed it could not be denied, that there was no power under the special constitution of the corporation which would warrant an arrangement of this nature. The reverse, as it seems to me, is the case here. The transaction here is warranted to my mind by the memorandum of association. Again in that case with regard to the call the provisions of the scheme as construed by the Court of Appeal were that it should be made for the purposes of fulfilling a guarantee if the surplus assets of the corporation should not reach 150,000*l.* to make good the deficiency. Here there is nothing of the kind. The call at 10*s.* per share is made, if I understand the facts, substantially to provide an asset in the shape of a certain sum of capital for which the buying company had stipulated as a part of their purchase. The amount was, by the terms of the agreement itself, to be provided, and was provided, so far as regards the valid making of the call, before the sale became binding upon the parties to it. If a sale of the company's undertaking is authorized by clause 11 of the memorandum, why should it be ultrà vires to provide a part of the undertaking in this form?

Suppose that the buying company had made it a condition of purchase that the plaintiff company should hand over to them a certain mining property such as the plaintiff company was authorized to acquire under the 2nd clause of their memorandum; and the directors of the plaintiff company had made this call in order to provide money in order therewith to buy the mining property and so be enabled to negotiate the sale, could it have been said, a sale being an authorized purpose, that the call was ultrà vires? If not, why should it be ultrà vires to provide an asset in money for the same authorized purpose?

As to the second point, the purely technical point, as to notice of the call, I have also come to the conclusion that the defence fails. So far as regards the fourth instalment of 2*s.* 6*d.* per share payable on September 19, 1892, I should be disposed to hold, if it were necessary, that the liquidator's letter of September 3 to the solicitors who were acting apparently as the defendants' agents throughout this matter, enclosing the notices sent in February to the testator's address, and returned through

the post, would be sufficient. But as to the other instalments, as well as to the last, I have come, though not without hesitation, upon a matter of construction, to the conclusion that the notice sent in ignorance of his death to the registered address of the testator in February, 1892, ought to be held to be sufficient notice as against these defendants, his representatives, in regard to the liability created by the call in respect of the testator's shares. It seems to me that to take this view, while it gives an adequate construction to the clause, presents, at any rate, less difficulty than to put so strict a construction on the word "member" in the 133rd article as to make it impossible for the company, as Mr. Jelf in fact contended that it was impossible, to enforce a call, in the event which happened here, on a member to whose address notice of call was duly sent, but who was in fact at that time dead, though not to the knowledge of the company, and the company being wound up becoming unable by reason of his death to send any notice until after the due date of the call was past.

There will be judgment for the plaintiffs with costs.

The defendants appealed.

Cozens-Hardy, Q.C., and *Eustace Smith*, for the appellants. The call was invalid as ultrà vires of the company, and cannot be enforced against the executors. The scope and objects of the Newbery-Vautin (Patents) Gold Extraction Company were much wider than those of the New Zealand Company, and, consequently, the latter had no power to amalgamate with the former. The learned judge has held that the transaction was a sale by the New Zealand Company of their undertaking under the power conferred by clause 11 of their memorandum of association. But unpaid calls are not included in the expression "undertaking," which means the business as a going concern: *King* v. *Marshall.* (1) Unpaid calls are not assets; and a bargain to make calls and sell them to another company is ultrà vires. So the transaction is invalid whether it is looked at as an amalgamation or a sale.

(1) 33 Beav. 565.

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[DAVEY, L.J., referred to *In re Pyle Works* (1) and *In re Sankey Brook Coal Co.* (2)]

Again no proper notice of this call has ever been given, or indeed could be given. The testator died before the call was made, and, in the absence of special provisions in the articles, a call cannot be made upon a dead man, neither can notice of a call be given to him. His executors were not made members of the company in his place, and at the time of the call there was, and up to the present time there is, no member on the register in respect of these shares to whom notice could be given in accordance with the articles. The directors might, perhaps, forfeit the shares, but they cannot sue the executors. The decision in *Clinch* v. *Financial Corporation* (3) turned upon s. 161 of the Companies Act, 1862.

[*Channell, Q.C.*, referred to *Turquand* v. *Kirby*. (4)]

[DAVEY, L.J., referred to Buckley on Companies, 6th ed., p. 451, note to Table A, clause 12.]

Table A is not applicable to this company.

Channell, Q.C., and *C. Mitchell*, for the respondents, were not called upon.

LINDLEY, L.J. I do not see any difficulty in deciding the first point. The contention is that the call was bad, because it was made for purposes which were ultrà vires of the company. This is an action brought by the liquidator of a company now in course of voluntary winding-up to enforce a call not made by him, but made by the directors before the commencement of the winding-up. The first point then is that it is invalid as being made for purposes which are ultrà vires. That question depends upon what were the objects for which the company was formed. The provisions of the memorandum are in extremely wide terms, and, amongst others, are clauses 7 and 12. [The Lord Justice read those clauses, and continued:—] Whilst these shares were still not fully paid up the company agreed to sell their undertaking to the Newbery-Vautin Company. That is the transaction in which they were engaged. It is said that the word "undertaking" does

(1) 44 Ch. D. 534.
(2) Law Rep. 9 Eq. 721; 10 Eq. 381.
(3) Law Rep. 4 Ch. 117.
(4) Law Rep. 4 Eq. 123.

not include uncalled capital. Perhaps it does not, but, although there may be no power to sell uncalled capital as part of the undertaking, it is nevertheless one of the terms of the sale of the undertaking that the uncalled capital should be called up before the sale is completed. There is nothing ultrà vires in that; there is no reason why they should not make that a condition of the sale; and I see no difficulty in that point at all.

The next point is a purely technical one. The shareholder, Mr. Peacock, obtained and was registered in respect of 380 shares, and he died on February 15, 1889. At the time of his death his name and address were still on the register, and that address was the place to which notices were to be sent. The company were not informed of Mr. Peacock's death; if they had been, it would have been their duty to rectify the register. On the other hand, Mr. Peacock's executors had no information that he had been the holder of these shares, and did not ascertain the fact until some time after the agreement for sale. After his death, and before the fact of his being a shareholder came to the knowledge of his executors, the call was made, and it is said that, he being dead, the directors could not make a call on him, and that, his executors not having been made members of the company in his place, there was no member in respect of his shares to whom notice could be given in accordance with the articles, and that consequently the call cannot be enforced against his estate. Notice of the call was sent addressed to him at his registered place of address, but it came back to the company marked "Gone away."

The question is whether under these circumstances his executors are liable to pay the call out of his assets. Let us go by steps. He became a member, but his executors did not become members, and were not bound to become members against their will. The articles are so drawn that they do not provide for dead men, nor for notice to dead men, nor for notice to anybody in the place of dead men. It is said that it is part of the bargain between the shareholders and the company that if a member dies and the company are going on and have no notice of his death, his estate cannot be called upon to pay calls. On the construction of the articles, I think it is obvious that no such bargain was intended.

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We must put a reasonable construction on the articles, and I have no doubt that the key to the difficulty is to be found in the suggestion made by Mr. Buckley, and that until notice of his death reaches the company calls may be made in respect of his shares by notices sent to his registered address just as if he were still a member. I have no doubt at all that that is the true construction of the articles. In order not to make these articles absurd, we must hold that a deceased member remains a member until notice is given.

A. L. SMITH, L.J. I agree.

DAVEY, L.J. I agree with the judgment and opinion which have just been expressed, and I agree with the reasons given for his decision by Kennedy, J. On the first point, I should have been almost prepared to admit that the scheme might have been an amalgamation, and I only hesitate because I do not know the exact meaning of the word "amalgamation," or whether it must not be a joining of two companies so as to form a third entity. If so, the scheme is not within clause 7; but I think it is clearly within the power of sale. The memorandum ought to be read fairly, and not so as to make this scheme ultrà vires if it is otherwise unobjectionable. I quite agree that if this is not an amalgamation it is a sale within clause 11. The question is whether the call is included in the sale. It has been held that the word "undertaking" does not include uncalled capital, and it would be ultrà vires to sell the right of making calls to another company. But there is nothing to prevent the directors exercising their power of making calls and then selling the assets thus produced. Mr. Cozens-Hardy has quoted no authority against that proposition, and I do not see anything to make it ultrà vires. The second question is whether article 133 can be read so as to include a deceased member, so that the company could serve him with notice in the way there provided. I do not think that if they had notice of the death of the member they could rely on service upon him at his registered place of address, and nothing that we say in this case touches that question. It is the duty of the representatives of a deceased member

to give notice of his death to the company at the earliest possible opportunity; and if they wish the company not to go on treating him as still on the books, it is the duty of the executors to give notice to the company of their desire to become members in his place. It is to be observed that Table A contains no such article as is said to be necessary, and it is surprising to me to hear that such a clause is requisite in order to make the estate of a deceased member liable. It would surprise most people to hear that without such an article you cannot make a call upon and enforce it against the estate of a dead member. I am prepared to adopt Mr. Buckley's suggestion, and to hold that a deceased member or his estate remains a member for the purpose of the articles so long as his name remains on the register without notice to the company of his death.

The appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Dalston, Sons, & Elliman.*

Solicitors for respondents: *Snell, Sons, & Greenip.*

W. W. K.

VESTRY OF PADDINGTON *v.* NORTH METROPOLITAN RAILWAY AND CANAL COMPANY.

1893
Dec. 1.

Metropolis—Expense of Flagging Footway — Owners of Houses and Land bounding or abutting on Road or Street — Metropolis Management Act, 1862, *Amendment Act,* 1890 (53 *&* 54 *Vict. c.* 54), *s.* 1.

By s. 1 of the Metropolis Management Act, 1862, Amendment Act, 1890 (53 & 54 Vict. c. 54), the expense of flagging a footway is to be borne by "the owners of the houses and the owners of the land bounding or abutting on the road or street in which such footway is situate . . . : Provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property":—

By s. 4, s. 250 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), which enacts that "the word 'street' shall include any road and a part of any road" is to apply to the provisions of the Act of 1890:—

Held, that, under s. 1, subject to the proviso, the expense of flagging is to be borne by the owners of the houses and the owners of the land on both sides of the road or street, or on both sides of the section of the road or street, in which the footway is situate.

SPECIAL CASE stated for the opinion of the Court.

The case stated that the vestry of Paddington had power to

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flag and apportion the expense of flagging footways in Blomfield Road, Paddington, under the Metropolis Management Act, 1862, Amendment Act, 1890 (53 & 54 Vict. c. 54) (1), and that Blomfield Road was a road or street in the parish of Paddington, running from the Edgware Road to Warwick Road, bounded on its southern side for a distance of 1400 feet by a towing-path by the side of the Regent's Canal which belonged to the North Metropolitan Railway and Canal Company, and on its northern side by private houses.

At the time of the passing of the Metropolis Management Act, 1855, there was a footway laid out along the south side of Blomfield Road, to a part of which footway the company's

(1) By s. 1 of the Metropolis Management Act, 1862, Amendment Act, 1890 (53 & 54 Vict. c. 54), s. 78 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), is repealed, and it is enacted that "in case any footway or part of a footway shall not have been flagged or only partially flagged, and the vestry or district board of works shall have deemed it necessary or expedient, or shall deem it necessary or expedient, that the same should be flagged either throughout the whole length and breadth thereof or any part of such length or breadth respectively, and such vestry or district board shall have flagged or be about to flag the same, the owners of the houses and the owners of the land bounding or abutting on the road or street in which such footway or any part thereof is situate, shall on demand pay to such vestry or district board of works the amount of the expense incurred, or the estimated expense to be incurred, in providing and laying such flagging. . . : Provided that it shall be lawful for the said vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they (the said vestry or district board) deem it just and expedient so to do."

By s. 4: "In the construction of this Act all the provisions contained in s. 250 of 18 & 19 Vict. c. 120 (the Metropolis Management Act, 1855) shall be deemed and taken to apply to and extend to the provisions of this Act."

By s. 250 of 18 & 19 Vict. c. 120 (the Metropolis Management Act, 1855), "the word 'street' shall apply to and include (inter alia) any road . . . . and a part of any (inter alia) such road."

Sect. 78 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), was as follows: "In case any footway . . . . shall not have been flagged, and the vestry or district board shall have deemed it necessary or expedient, or shall deem it necessary or expedient that the same should be flagged, and such vestry or board shall have flagged or shall flag the same either throughout the whole breadth thereof or any part of such breadth, it shall be lawful for such vestry or board to levy the cost and expenses by a rate or rates upon the occupiers of the houses in the road street or part abutting on or next to the footway which shall have been so flagged."

towing-path was immediately adjacent. The footway had at such time been repaired and curbed with stone by the vestry, but had not been flagged. The vestry, having now determined to flag the footway, in their apportionment charged the company with a sum which bore the same proportion to the whole expense that the length of the part of the footway to which the company's land was adjacent bore to the whole length of the footway. They charged the whole expense on the owners of land on the south side of Blomfield Road abutting on the footway, and did not charge the owners on the north side of the road, or the owners of land or houses on the south side not abutting on the footway.

The company had, under the Regent's Canal City and Docks Railway Act, 1882 (45 & 46 Vict. c. cclxii.), and subsequent Acts of Parliament, parliamentary powers authorizing them to construct a railway by the side of the Regent's Canal, and proposed to exercise such powers.

The questions for the opinion of the Court were:—

1. Whether the expense was to be charged on the owners on the south side only or on the owners on both sides of the road?

2. Whether the expense was to be charged on the owners of the land or houses abutting on the footway, or on all the owners on the south side of the road, or on all the owners on both sides of the road?

3. Whether the proviso in s. 1 of the Metropolis Management Act, 1862, Amendment Act, 1890, applied?

Horace Avory, for the vestry. The question is as to the construction of s. 1 of the Metropolis Management Act, 1862, Amendment Act, 1890, which repeals s. 78 of the Metropolis Management Act, 1862, and with which s. 250 of the Metropolis Management Act, 1855, is incorporated. The persons who are now to contribute are, "the owners of the houses or the owners of the land bounding or abutting on the road or the part of it in which the footway is situate." The vestry contend that the part of Blomfield Road in which this footway, which is on the southern side, is situate, within the meaning of the Act, is the

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longitudinal section of the road of the same length as the footway on the southern side, and that as none but the southern properties bound or abut on this longitudinal section, none but the owners of these southern properties are chargeable. A footway on the south side is for the use of the owners on the south side, and "Qui sentit commodum sentire debet et onus": see per Grove, J., in *Wakefield Sanitary Authority* v. *Mander*. (1) This method of charging was authorized by s. 78 of the Metropolis Management Act, 1862, the words of which were, "the occupiers of the houses in the road street or part abutting on or next to the footway"; and it is submitted that the only effect of s. 1 of the new Act is to transfer the liability from occupiers to owners.

[WILLS, J. The words, "the owners of land bounding or abutting on the road or the part of it in which the footway is situate," are free from ambiguity, and refer to the transverse section of the road. The vestry ought to have charged the owners on both sides.]

In *Vestry of Mile End* v. *Guardians of Whitechapel Union* (2), under the Metropolis Management Acts, the owners of houses on both sides of a street were held to be chargeable with the costs of paving a footway on one side of it, but only, as appears from the judgment of Jessel, M.R., because of the expression "owners of the houses forming the street" in s. 105 of the earlier Act. Here there are no such words. In *Wakefield Sanitary Authority* v. *Mander* (1), under s. 150 of the Public Health Act, 1875, it was held that the owners on the side of the street containing the footway which had been repaired were alone chargeable.

[WRIGHT, J. That section speaks of "owners or occupiers of premises abutting on the parts which require to be paved."]

R. M. Bray, for the company. The company contend that the owners on both sides of the section of Blomfield Road containing the footway are chargeable; and, not only so, but that the owners on both sides of Blomfield Road throughout its whole length are chargeable.

[WRIGHT, J. The second contention is erroneous. As s. 250 of the Metropolis Management Act, 1855, applies, only the

(1) 5 C. P. D. 248. (2) 1 Q. B. D. 680.

owners on both sides of the tranverse section containing the footway are chargeable.]

As the property of the company does not consist of houses, the proviso clearly applies.

WILLS, J. I do not think that this matter admits of any doubt. The clause which has been repealed might perhaps have assisted the contention of the vestry; but the amending Act expressly says that the persons who are to contribute are "the owners of the houses or the owners of the land bounding or abutting on the road or part of the road in which the footway is situate." What can this mean, except that, as regards the apportionment of the expense, the footway is to be regarded as part of the road or part of the section of the road, which is to be flagged, from side to side? Subject to the proviso, the expense is to be borne by the owners of the land and the owners of the houses on both sides of the section of Blomfield Road which contains the footway. Our judgment must be for the company.

WRIGHT, J., concurred.

Judgment for the company.

Solicitor for the plaintiffs: *John H. Hortin.*

Solicitors for the defendants: *Hollams, Sons, Coward, & Hawksley.*

H. D. W.

1893
Nov. 13, 17, 18, 25.

IN RE HEAD. EX PARTE HEAD.

Bankruptcy—Partnership—Separate Estates—Proof by solvent Partner for separate Debt against separate Estate of insolvent Partner—Rule in Ex parte Topping (4 *D. J. & S.* 551).

Where a partnership is insolvent, and a proof is tendered by a solvent partner against the separate estate of his insolvent partner in respect of a separate debt, it is no objection to such proof that the dividend to be received from the insolvent separate estate will swell the surplus that will eventually go from the solvent partner's estate to pay the joint debts of the partnership.

Lacey v. *Hill* (Law Rep. 8 Ch. 441) discussed.

SPECIAL case stated under s. 97 of the Bankruptcy Act, 1883, for the opinion of the judge of the High Court.

For many years G. S. Head and G. Head, prior to the death of the latter, carried on business in co-partnership, as bankers at East Grinstead, under articles of partnership in the name of G. & G. S. Head.

G. Head died in December 1890; and in January 1891, his will was duly proved by G. S. Head, W. A. Head, and E. Taylor, the executors and trustees thereof.

After the death of G. Head, G. S. Head continued to carry on the banking business in the firm name until February 24, 1892, when he suspended payment; and on May 14, 1892, he was adjudicated bankrupt, and C. Kemp and J. Turner were appointed the trustees under his bankruptcy.

At the commencement of the bankruptcy there remained in specie joint assets of the late partnership which had not been converted into the separate property of the bankrupt. There were also joint creditors of the partnership whose debts had not been converted into separate debts of the bankrupt.

The separate estate of the bankrupt and the joint estate of the partnership were each of them insolvent.

The books of the partnership did not contain any separate account of the capital for the time being invested in the business; but an account was kept in the name of G. Head as a customer of the bank, and he was in the habit during his life of paying into such account the income of his private invest-

ments as well as his share of the partnership profits, and of drawing on such account, just as any other customer of the bank might have done, and at the date of his death the sum of 2204*l.* 14*s.* 9*d.* was standing in the books to the credit of this account. After his death the account was continued without any break, the bankrupt debiting the account with payments from time to time made by him as executor on behalf of G. Head's estate, and crediting it with sums received or which he treated in the books as having been received by him on behalf of the same estate. [This point is sufficiently noticed in the judgment.]

The separate estate of G. Head (exclusive of the 2204*l.* 14*s.* 9*d.*) was sufficient to pay his separate creditors in full, and to provide a considerable surplus towards payment of the joint creditors; but such surplus, with the aid of the joint estate, was insufficient to pay the joint creditors in full.

On March 6, 1893, W. A. Head and E. Taylor, as executors of G. Head and in respect of his separate estate, tendered a proof for the 2204*l.* 14*s.* 9*d.* against the separate estate of G. S. Head. This proof was rejected by the trustees in bankruptcy on the ground (amongst others) that no claim in respect of it could be made until all the creditors of the late partnership of G. & G. S. Head had been paid in full. The executors of G. Head appealed from the rejection of their proof, and by consent a special case was stated for the opinion of the High Court on this and other points.

B. Muir, for the executors of G. Head, deceased. This proof does not infringe the rule that a partner cannot prove in competition with his own creditors against the separate estate of his partner. The case falls within the principle of *Ex parte Topping* (1); *Ex parte Westcott* (2); *In re Hepburn.* (3)

Wace, for the trustees in bankruptcy. The proof is subject to the strict rule that joint creditors cannot prove against the separate estate of a partner in competition with the separate creditors of that partner: *Ex parte Collinge.* (4) The proof in

(1) 4 D. J. & S. 551.
(2) Law Rep. 9 Ch. 626.
(3) 14 Q. B. D. 394.
(4) 4 D. J. & S. 533.

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question is in substance a proof by joint creditors, for the estate of G. Head is solvent, and any benefit that may arise from the proof will increase the surplus to be paid over to to the joint creditors of the firm. The judgment of Lord Romilly in *Lacey* v. *Hill* (1) supports this view.

B. Muir, in reply, referred to Lindley on Partnership, 6th ed. p. 615; *Nanson* v. *Gordon*. (2)

Cur. adv. vult.

Nov. 25. VAUGHAN WILLIAMS, J. This is a special case stated under s. 97 of the Bankruptcy Act, 1883, and the question raised is whether the proof tendered by the executors of G. Head, deceased, against the separate estate of G. S. Head, the bankrupt, who was formerly in partnership with G. Head, deceased, ought to be admitted. The first objection to the proof is that it is in substance a proof by the joint creditors of G. S. Head against his separate estate in competition with his separate creditors. It appears that the separate estate of G. Head, deceased, is solvent, and there will be a surplus from his estate to go to the joint creditors of the late partnership, and it is said that, if this proof is allowed against the separate estate of G. S. Head, the dividend received from that estate will be received for the benefit of the joint creditors of G. Head and G. S. Head. Now, it is a rule in the administration of the estates of partners that although one partner may prove against the estate of his co-partner he must not do so in competition with his own creditors. He therefore could so prove when all the joint creditors had been paid in full; and it was held in *Ex parte Topping* (3) that he might so prove against the separate estate of his co-partner when it was plain that there could be no surplus of such separate estate to distribute amongst the joint creditors. For as by Lord Loughborough's rule of administration of partnership estates the joint and separate estates are respectively appropriated in the first instance to the joint and separate creditors respectively, it follows that joint creditors can only prove on the separate estates of the partners where there is a surplus of such estates respectively, and therefore

(1) Law Rep. 8 Ch. 443. (2) 1 App. Cas. 195.
(3) 4 D. J. & S. 551.

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that a partner seeking to prove against the estate of his co-partner will only come in competition with the joint creditors, who are of course his own creditors, in cases where the separate estate will yield a surplus. Such proof was no breach of the rule against a partner proving in competition with his own creditors. It was suggested in *Lacey* v. *Hill* (1) that this principle laid down in *Ex parte Topping* (2) had no application in a case where there was a surplus of the estate of the partner on whose behalf the proof was tendered, because it was said that in such a case to allow the proof would be really to allow the joint creditors to come upon the insolvent separate estate of the partner against whose estate the proof was tendered to the detriment of the separate creditors of that partner, and in violation of Lord Loughborough's first rule. This contention has nothing to do with the rule about a man not competing with his own creditors. It is merely a contention that one partner ought not to be allowed to prove against another where the result of the proof will be to benefit the joint creditors at the expense of the separate creditors, because to allow such a proof in such a case would be to disregard the branch of Lord Loughborough's first rule, which appropriates separate assets to separate creditors. But the answer to this seems to me to be that Lord Loughborough's rule was satisfied when proof was made by one partner as a separate creditor on the separate assets of the other partners, pari passu, with the other separate creditors to the exclusion of the joint creditors. The equity between the partners on which Lord Loughborough's rule is based is satisfied when the joint assets are appropriated primarily to the joint liabilities and the separate assets to the separate liabilities. The partner whose estate is insolvent cannot say that it is inequitable that the dividend derived from his separate estate, which is paid on the debt which he owes his partner, should be appropriated, after payment in full of the separate creditors of the partner whose estate is solvent, amongst the joint creditors of himself and such partner. The fact is, that by the time the dividend has reached the joint creditors it has ceased to be separate estate of the partner out of whose estate it is paid, and his separate creditors have no longer

(1) Law Rep. 8 Ch. 443. (2) 4 D. J. & S. 551.

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any interest in it, and cannot be said to be robbed of it. The confusion arises from treating the separate creditors of the two partners as one constituency who have a right to the separate assets of the two partners in priority to the joint creditors, whereas in truth the separate creditors of each partner are a separate constituency, and the separate creditors of one partner have no interest in the separate estate of the other partner. There is therefore nothing in Lord Loughborough's rule relating to the administration of joint and separate estates of insolvents to prevent the admission of this proof.

[The learned judge, however, held on the evidence that the proof could not be sustained, because the 2204*l.* 14*s.* was at the date of the death of G. Head a debt of the partnership; but directed the matter to stand over for further evidence on the point as to whether the proof might not be maintained, either in whole or in part, on the ground that the bankrupt, quâ executor, committed a breach of trust in continuing the account with an insolvent bank.]

Solicitors for the executors: *Morrisons.*
Solicitors for the trustees in bankruptcy: *Linklaters.*

H. L. F.

IN RE CHARLWOOD. EX PARTE MASTERS.

1894
Feb. 22, 26.

Bankruptcy—Assets—Money paid to Solicitor—Defence on Criminal Charge—Agreement for Payment of a Lump Sum—Right to retain for Services rendered after Knowledge of Act of Bankruptcy.

A solicitor made an agreement in writing with a client who was charged with murder, by which, in consideration of a lump sum paid, the solicitor agreed to conduct the defence and provide for the necessary expenses. Some days after the money had been paid under the agreement the client committed an act of bankruptcy, of which the solicitor had notice on the following day, and a receiving order was afterwards made. The solicitor conducted the defence in accordance with the agreement.

On an application by the trustee in bankruptcy of the client for an order for payment to him of the money which the solicitor had received under the agreement:—

Held, that the agreement was valid and binding, and the solicitor was entitled, as against the trustee, to retain the money which he had received under it.

In re Pollitt, Ex parte Minor ([1893] 1 Q. B. 175, 455), distinguished.

APPEAL by Masters, the trustee in bankruptcy of Charlwood, from an order of the judge of the county court at Tonbridge Wells, dismissing the appellant's application for an order directing repayment by Mr. Cripps, a solicitor, of all money representing work done by him on behalf of the bankrupt after knowledge on his part of an act of bankruptcy committed by the bankrupt.

On November 30, 1892, a coroner's jury found a verdict of wilful murder against Charlwood, in respect of the death of a woman who was alleged to have died in consequence of an illegal operation, which it was alleged Charlwood had caused to be performed. Thereupon Charlwood caused some property which he had to be sold, and on December 3, 1892, an agreement in writing was entered into between Charlwood and Cripps, reciting that Charlwood had already paid 25*l.* to Cripps, and agreed to pay him a further sum of 250*l.* within a week, and in consideration of the total of 275*l.* Cripps undertook to conduct Charlwood's defence on the charge of murder, and to provide for all the necessary expenses. The sum of 250*l.* was accordingly paid to Cripps. On December 20, 1892, Charlwood committed an act of bankruptcy by execution being levied by seizure of his goods, of which Cripps had notice on the following day, and

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a receiving order was afterwards made. Cripps conducted the defence of Charlwood before the magistrates, and at the trial, which resulted in a conviction for manslaughter.

Herbert Reed, Q.C. (*G. Spencer Bower*, with him), for the appellant. The decision of the county court judge is incorrect, and the trustee in bankruptcy is entitled to the money paid under the agreement of December 3, 1892. The case is governed by *In re Pollitt, Ex parte Minor.* (1) The agreement is invalid under the bankruptcy law, and therefore nothing in the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), can give it validity. This is expressly provided by s. 12. The present case is not within *In re Sinclair, Ex parte Payne* (2), and moreover the doctrine of that case ought not to be extended: *In re Spackman, Ex parte Foley*, per Cave, J. (3); *In re Pollitt, Ex parte Minor* (1), per Vaughan Williams and Wright, JJ. (4), and Lord Esher, M.R. (5) If the substance of the transaction is looked at the effect is to give the solicitor security for his remuneration. [He also referred to *In re Wright, Ex parte Arnold* (6), and *In re Simonson, Ex parte Ball.* (7)]

Dickens, Q.C., and *Upjohn*, (*C. F. Gill*, with them), for the respondent. *In re Pollitt, Ex parte Minor* (1), is distinguishable, for here the agreement is for payment of a lump sum in consideration of certain definite services. The property in the money had passed out of the debtor before any act of bankruptcy was committed. There can be no possible suggestion of fraudulent preference. The contract was indivisible, and the subsequent bankruptcy cannot render it divisible. It is a good agreement under the Attorneys and Solicitors Act, 1870. That Act provides by ss. 10, 13, and 14 for dealing with agreements between solicitors and their clients under certain special circumstances; but none of those provisions touch the present case. This is a stronger case in favour of the solicitor than *Ex parte Sinclair, In re Payne* (2), for here the debtor was on his trial for

(1) [1893] 1 Q. B. 175, 455.
(2) 15 Q. B. D. 616.
(3) 24 Q. B. D. 728, at pp. 734, 735.
(4) [1893] 1 Q. B. at pp. 178, 179, 180.
(5) [1893] 1 Q. B. at p. 458.
(6) 3 Ch. D. 70.
(7) [1894] 1 Q. B. 433.

his life, and the necessity for professional services was therefore greater. If this agreement is held to be invalid, the result will be that no bankrupt can ever be defended on a criminal charge. [They also referred to *Rees* v. *Williams* (1); *Ex parte Taylor, In re Goldsmid.* (2)]

Herbert Reed, Q.C., in reply, referred to *Collyer* v. *Isaacs.* (3)

VAUGHAN WILLIAMS, J. I am of opinion that the appeal of the trustee in bankruptcy must fail. I thought when Mr. Reed first opened the case on Tuesday that it was going to raise a very interesting point, for I thought it would raise the question whether it was necessary that the trustee in bankruptcy should give notice to the person who had received money under the contract in order to disentitle that person to apply the money which he had received for the purpose of carrying out the terms of the contract. In the present case, however, on December 3, 1892, before any act of bankruptcy had been committed, a contract was entered into for payment of a lump sum, in consideration of which the solicitor undertook to conduct the defence on a charge of murder of the person who afterwards became bankrupt, and to provide for any expenses that might be incurred in the course of such defence. On the view I take of the terms of that contract, it is plain that the solicitor could in no case be entitled to demand anything more than the sum of 275*l.*, and that he could not be made accountable for, or be compelled to restore, any part of that sum. If that is the proper view of the meaning of the contract, Mr. Reed very properly admits that it cannot be set aside. The cases which were cited in argument are applicable where money has been paid to secure services; but they have no application where, as in the present case, a lump sum has been paid in consideration of definite services. That being so, the only point which remained open to Mr. Reed on the circumstances of the case was to contend that the Court was bound to say that, although the contract, on the face of it, was for payment of a lump sum in consideration of definite services, yet, if the substance of the

(1) Law Rep. 10 Ex. 200. (2) 18 Q. B. D. 295.
(3) 19 Ch. D. 342.

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transaction were looked at, the effect was to give Mr. Cripps security for his remuneration. I am of opinion that there is nothing which entitles us to come to the conclusion that the substance of the transaction was in any way different from its form. It is obvious that in the Court below the trustee in bankruptcy did not make that case. Possibly, if there were anything to support such a view of the transaction, he might even yet ask for leave to adduce fresh evidence; but the case made in the county court was that the present case came within the decision in *In re Pollitt, Ex parte Minor*. (1)

WRIGHT, J. I am of the same opinion. In *In re Pollitt, Ex parte Minor* (1), the money of the debtor was handed to the solicitor, who was to apply it to meet future costs. On the occurrence of the bankruptcy the authority ceased, and the money went to the trustee. In the present case there was a bonâ fide agreement, and when the bankruptcy took place the 275*l*. no longer belonged to Charlwood. There is no evidence that the agreement was not bonâ fide. If there were, probably there would be a sufficient remedy under s. 10 of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), under which agreements may be reopened after payment under special circumstances, or, in the case of a change of solicitors, under s. 14 of the same statute. There is one other observation which I wish to make. As to the consideration urged on behalf of the respondent, that unless such an agreement were upheld it would be impossible for a bankrupt who was being prosecuted on a criminal charge ever to be defended, I think that rule 325 of the rules under the Bankruptcy Acts, 1883 and 1890, would enable the official receiver to make such allowance as might be right, subject to the directions of the Board of Trade, or, possibly, under rule 334, the official receiver might apply to the Court for directions.

Appeal dismissed.

Solicitor for appellant: *C. T. Wilkinson.*

Solicitors for respondent: *Sole, Turner, & Knight, for Daish, Tonbridge Wells.*

(1) [1893] 1 Q. B. 175, 455.

P. B. H.

THE CONSERVATORS OF THE RIVER THAMES, APPELLANTS; THE PORT SANITARY AUTHORITY OF THE PORT OF LONDON, RESPONDENTS. 1893 Dec. 1.

River—Nuisance on Foreshore of Navigable River—Inability to find Person causing Nuisance—Liability of Owner of Foreshore to abate—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 4, *sub-ss.* 1, 3 (*b*).

By s. 4, sub-s. 1, of the Public Health (London) Act, 1891, the sanitary authority, if satisfied of the existence of a nuisance liable to be dealt with summarily under that Act, are to serve a notice requiring its abatement on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises; sub-s. 3 (*b*) contains a proviso that where the person causing the nuisance cannot be found, and it is clear that it does not arise or continue by the act, default, or sufferance of the occupier or owner of the premises, the sanitary authority may themselves abate it.

The appellants were a public body having certain jurisdiction and powers over the River Thames, the bed and soil whereof and of the shores within the flux and reflux of the tides were vested in them by statute. The Acts by which their duties were regulated gave them various powers for the improvement of the navigation of the river, but gave them no power of scavenging or removing nuisances in the portion of the river hereafter referred to, and their power of raising funds, and the application of the funds when raised, were strictly limited by statute and did not include a power of raising money for the sanitary improvement of such portion of the river. A nuisance injurious and dangerous to health existed between high and low water-marks in a tidal creek running inland about 400 or 500 feet from the line of the river; it consisted of an accumulation of foul mud, which was largely composed of decomposing organic matter, and was chiefly derived from matter held in suspension in the water or floating on its surface and left when the tide receded; it was impossible to fix upon any person or persons as having caused the accumulation. An order having been made upon the appellants as owners of the premises upon which the nuisance existed for its abatement:—

Held, that s. 4, sub-s. 1, must be read with the proviso in sub-s. 3 (*b*); that where the person causing the nuisance could not be found, the liability of the owner of the premises to abate it only arose where it was shewn that it continued by his act, default, or sufferance, and that the order upon the appellants was therefore wrongly made:

Held, further, that under their Acts of Parliament the appellants were owners of the soil and foreshore of the river for certain specified purposes only, and were not owners for the purposes of s. 4 of the Public Health (London) Act, 1891.

CASE stated by a metropolitan police magistrate.

A complaint had been preferred by the respondents, the port

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sanitary authority of the port of London, against the appellants, the conservators of the River Thames, under s. 4 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), charging that at certain premises being the shore of a certain part of the River Thames, whereof the appellants were owners within the meaning of that Act, known as Limekiln Creek, Limehouse, a nuisance existed, namely, an accumulation or deposit of refuse, rubbish, and filth, which was a nuisance injurious and dangerous to health, and that the persons by whose act, default, or sufferance the said nuisance arose could not be found. The learned magistrate made an order upon the appellants to abate the nuisance, but stated a case from which the following facts appeared:—

1–13. The corporation of the city of London were the port sanitary authority of the port of London, the respondents. The appellants were a statutory body created by the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), with certain jurisdiction and powers over the River Thames conferred by that and subsequent Acts. (1) The respondents had served upon the appellants a notice, which had not been complied with, requiring the abatement of the nuisance complained of.

Limekiln Creek was a creek running up from the River Thames at an acute angle extending inwards from the general line of the river from 400 to 500 feet, and in the opinion of the witnesses was originally a natural creek; but wharf walls had been built round it at the sides and top, and both sides were used for wharfage purposes. The creek was tidal, the tide extending to the top.

A nuisance injurious and dangerous to health existed in the creek between high and low water-marks, the worst part being about 200 feet from the ordinary line of the river; it consisted of a large accumulation of foul mud which was largely composed of decomposing organic matter, derived from the following sources: (*a*) Matter held in suspension in the water and depo-

(1) The chief Acts (other than the principal Act) regulating the powers of the Thames Conservancy are the Thames Conservancy Act, 1864 (27 & 28 Vict. c. 113), the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), the Thames Conservancy Act, 1867 (30 & 31 Vict. c. ci.), and the Thames Navigation Act, 1870 (33 & 34 Vict. c. cxlix.).

sited at the upper end of the creek, including a certain quantity of sewage from the main sewage outfalls which were within the metropolis. (*b*) Matter which floated on the surface of the water, such as oranges, vegetables, and remains of dead animals, which were left when the tide receded. (*c*) Hay and straw lost from barges discharging in the creek. (*d*) Soap and water or sulliage from two of the premises adjoining the creek. (*e*) Matter thrown overboard from barges. As regarded an enormous proportion of the accumulation it was impossible to fix upon any person or persons who caused it.

The creek was situate within the limits of the jurisdiction of the appellants and respondents respectively and between the western and eastern boundaries of the metropolis. The harbour-master of the appellants was in the habit of giving directions as to the mooring or removing of barges within the creek; the inspector caused the removal of dead animals found therein, and on two occasions the appellants had given permission for the execution of works upon the barge beds opposite wharves at the entrance of the creek; some years previously the appellants had put up a notice board at the head of the creek forbidding persons to throw rubbish therein. The appellants received payment under the Thames Conservancy Act, 1857, for mooring and landing-stages and other erections on various parts of the foreshore of the River Thames within the limits of their jurisdiction.

14. The respondents contended, (*a*) That under s. 50 (1) of the Thames Conservancy Act, 1857, the bed and soil of the foreshore of the creek had vested in the appellants. (*b*) That under that section and other sections of the same statute the appellants were "owners" of the premises on which the nuisance existed within the meaning of s. 141 of the Public Health (London)

(1) By s. 50 of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), all the estate, right, title and interest of the corporation of the city of London in the bed, soil, and shores of the River Thames, from Staines in Middlesex to Yantlet in Kent, and all the estate, right, title and interest of the Crown in the bed, soil, and shores of the river within the flux and reflux of the tides between the same places, were, with certain immaterial exceptions, vested in the conservators, in whom the powers of the Crown and of the corporation were by s. 52 also vested.

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Act, 1891 (1), and as such liable to abate the nuisance under s. 4 of that Act.

15. The appellants contended, (*a*) That it was not proved that the soil of the creek had ever vested in them. (*b*) That if vested in them it was so in a qualified manner only, namely, to the extent and for the purposes and subject to the responsibilities contained in the Thames Acts, 1857 to 1883. (*c*) That the construction placed by the respondents on the general language of the interpretation clause (s. 141) of the Public Health (London) Act, 1891, amounted to construing it as an implied repeal of the Thames Acts by which the responsibilities of the appellants were defined. (*d*) That upon the true construction of the sections of the Thames Acts the appellants were impliedly absolved from the liability sought to be imposed on them. (*e*) That on the true construction of the Thames Acts and of the Public Health (London) Act, 1891, they were not owners of the creek within the meaning of the last-mentioned Act. (*f*) That under s. 52 of the Thames Conservancy Act, 1857, they were in the same position as the Crown had been in, and were therefore not liable under the Public Health (London) Act, 1891, not being named therein. (*g*) That it being clear that the nuisance did not arise by the act, default, or sufferance of the appellants, the respondents were themselves compellable to abate the nuisance under s. 4, sub-s. 3 (*b*) of the Public Health (London) Act, 1891. (*h*) That the removal of the dead bodies of animals was a gratuitous act which the appellants were under no statutory obligation to do.

Upon the facts the learned magistrate held as matter of law that the appellants were the owners of the premises on which the nuisance arose within the meaning of the Public Health (London) Act, 1891, and were liable under that Act to abate the nuisance.

The questions of law for the opinion of the Court were those set out in paragraphs 14 and 15 of the case.

If the Court were of opinion that the appellants were such

(1) By s. 141 of the Public Health (London) Act, 1891, "owner" means the person for the time being receiving the rack-rent of the premises in connection with which the word is used, or who would so receive the same if such premises were let at a rack-rent.

owners and were so liable, the order was to stand; if of a contrary opinion, it was to be reversed.

Sir *H. James, Q.C.* (*Bankes*, with him), for the appellants. The order was wrong, the appellants being under no statutory liability to remove the nuisance. The Thames Conservancy Act, 1857, which created the conservators and vested in them the rights of the Crown and the corporation in the bed and foreshore of the river, did not make them owners for all purposes of the foreshore. That Act contains restrictive clauses as to the power of the appellants to raise money which are inconsistent with the idea of ownership, together with a specific direction as to the application of their funds, of which one-third is to be paid to the Crown, and two-thirds are to be applied to the general purposes of the Act. Those purposes do not include scavenging or sanitary matters, as to which nothing is said in the Act, and the power of removal of nuisances is confined to such as may injure the river or obstruct the navigation; this particular nuisance complies with neither of those requirements, though it may be injurious to the neighbourhood. The appellants have under that Act no funds legally and properly applicable to the removal of nuisances such as the present. It is true that by the Thames Navigation Act, 1866, scavenging powers were conferred upon the conservators as regards the upper river above Staines, which were by the Thames Conservancy Act, 1867, extended to the portion from Staines to Chiswick, and by the Thames Navigation Act, 1870, to the part from Barking to Yantlet; but the portion between Chiswick and Barking—that is, between the western and eastern boundaries of the metropolis—is untouched by the scavenging powers given to the conservators over the rest of the river.

By s. 141 of the Public Health (London) Act, 1891, "owner" is defined as being "the person who from time to time receives the rack-rent of the premises"; but this foreshore could not have been let at a rack-rent at all, and the appellants do not come within that definition. Nor is the definition of "premises" as including "messuages, buildings, lands, easements and hereditaments of any tenure" applicable to the present case, for there can be no tenure of this foreshore. The appellants have

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only a qualified ownership, and can only be compelled to perform the duties applicable to such ownership; the mere ownership of land which is incapable of being turned to profit does not impose upon the owner such duties as those sought to be cast upon the conservators: *Angell* v. *Paddington Vestry.* (1) The appellants are therefore not owners of the land upon which the nuisance arises within the meaning of s. 4 of the Public Health (London) Act, 1891, and were under no liability to remove this nuisance. The proper remedy is that contained in the proviso in s. 4, sub-s. 3 (*b*), of that Act, which gives the sanitary authority power to abate the nuisance; and if this foreshore comes within the definition of "premises," the respondents must exercise their power of abatement. [He also cited *Great Eastern Ry. Co.* v. *Hackney Board of Works* (2); *Wright* v. *Ingle.* (3)]

Poland, Q.C. (*Alex. Glen,* and *Jenkins,* with him), for the respondents. The order was properly made upon the appellants, who were liable under s. 4 of the Public Health (London) Act, 1891, to remove this nuisance. The intention of the section is, that proceedings shall be taken against the person causing the nuisance, if he can be found; if not, the sanitary authority are to have recourse to the owners and occupiers of the land where the nuisance in fact is, and who may be said to possess the nuisance. The question in the present case is, therefore, whether, within the meaning of that section, the appellants are the owners of the land on which the nuisance in fact exists. Their true position is, that they are owners in fee of this land, the public having a right of passage along it when the water is up; and it has long since been decided that, in respect of their ownership of the soil of the river, the conservators are like ordinary owners in fee, and have the same title to compensation if their land is taken: *Conservators of River Thames* v. *Victoria Station and Pimlico Railway Co.* (4)

[LORD COLERIDGE, C.J. That was merely for the purpose of the Lands Clauses Consolidation Act.]

The conservators have power under their Acts to let this land for the purpose of building a pier or a wharf, which seems to be

(1) Law Rep. 3 Q. B. 714.
(2) 8 App. Cas. 687.
(3) 16 Q. B. D. 379.
(4) Law Rep. 4 C. P. 59.

a conclusive test of ownership, seeing that the trustees of a school have been held to be owners of land held by them, although they were compelled to use it for the purposes of an Act of Parliament, and had not even power to let it: *Bowditch* v. *Wakefield Local Board.* (1) It is no answer to say that they have no funds applicable to the purpose, or to say that they are merely a public body, incorporated by Act of Parliament for certain public purposes; they must perform the duty cast upon them by using the fund which they have: *Mersey Docks Trustees* v. *Gibbs* (2); *Reg.* v. *Birkenhead Docks.* (3) The obligation imposed on the appellants as owners or occupiers of the land on which the nuisance exists is not got rid of by the proviso in s. 4, which allows the sanitary authority to remove it; that is not a duty cast upon the sanitary authority, but a mere permissive power. [He also cited *Margate Pier Co.* v. *Margate Town Council.* (4)]

LORD COLERIDGE, C.J. I am of opinion that the appellants are entitled to our judgment, and that no such duty is imposed upon them by statute as has been contended for by the respondents. The duty and liability imposed upon the appellants, if imposed at all, must depend upon the Public Health (London) Act, 1891. It is true, as I understand the case, that the learned magistrate has found that a nuisance exists in fact, but there is nothing to suggest (indeed, there is much to suggest the contrary) that the nuisance was created by any act, default, or sufferance of the appellants, assuming them to be for certain purposes the occupiers of the piece of land on which it has arisen; that is not found in the case, and we cannot assume it against them. The Act of 1891 enacts, in s. 4 (I omit the unnecessary words), that "the sanitary authority may serve a notice on the person by whose act, default or sufferance the nuisance arises or continues;" that has not been done in this case, because he cannot be found; "or, if such person cannot be found, on the the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified,

(1) Law Rep. 6 Q. B. 567.
(2) 11 H. L. C. 686.
(3) 21 L. J. (M.C.) 209.
(4) 20 L. T. (N.S.) 564.

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and to execute such works," and so forth. That notice was served by the sanitary authority upon the appellants. But the section contains the following proviso, which must be construed with it: "provided that where the person causing the nuisance cannot be found" (that is one case), "and it is clear that the nuisance does not arise or continue by the act, default or sufferance of the occupier or owner of the premises" (that is another case, and here there is no suggestion that any act, default, or sufferance of the conservators has created or continued the nuisance), then the sanitary authority may themselves abate the nuisance, and do what is necessary to prevent its recurrence. It would be easy to suggest cases in which great injustice would be worked if we did not construe this section with the proviso as we propose to construe it. A great sewer might burst, causing a nuisance on some person's land; but it would not be by the act, default, or sufferance of the owner or occupier of that land that the sewer had burst and the nuisance been caused. According to the contention of the respondents, however, that would be immaterial; there would be an owner or occupier and a nuisance, and upon service upon the owner or occupier of notice requiring the removal of the nuisance, remove it he must, at whatever cost. In my opinion, that is not the meaning of the Act of Parliament. The plain meaning of that proviso is that before the liability of the owner or occupier arises, it must be impossible to find the maker of the nuisance, and the nuisance must continue by the act, default, or sufferance of the owner or occupier. Neither of those requisites is satisfied in the present case.

It has further been well pointed out that the sanitary authority under certain circumstances has a general power, where the proper person will not do his duty and remove the nuisance, of removing it themselves; but, before any one can be held in default, the words of the proviso must be satisfied, and if they are not satisfied the sanitary authority may themselves abate the nuisance, or do what is necessary to prevent it. Remembering the decision in *Julius* v. *Bishop of Oxford* (1), I do not construe "may" as "must"; but I have no doubt that, if a state of things arose in which the person creating the nuisance could not

(1) 5 App. Cas. 214.

be found, and in which the continuance of the nuisance was not in the least degree owing to the act, default, or sufferance of the particular person served with the notice, in such a case, if the sanitary authority did not perform the duty they were empowered to do, they could be compelled to fulfil it by indictment. The remedy, therefore, under s. 4, construed with the proviso, appears to me to be complete and perfect.

That would, perhaps, be sufficient to dispose of this case; but there are other matters to which I may shortly refer. It is admitted that, in the whole of the Thames Conservancy Acts, as regards this particular part of the river, there is not a word said about the removal of nuisances. The pollution of the river is guarded against, and certain duties in respect of its pollution, apart from all question of navigation, are treated of in certain Acts as existing duties; but they are limited to particular portions or areas of the river, of which this is not one. In the upper portion of the river, where for purposes other than navigation the purity of the water is of the utmost importance, the conservators are invested with powers which they have a right to put in force for the purpose of preventing pollution or removing nuisances; and the fact that these statutory powers are given in terms, where it is necessary and just that they should exist, is a strong argument to shew that, where they are not given, they are intentionally withheld.

Another strong argument in favour of the conservators is that their Acts of Parliament have carefully limited the sums they are to receive, and have carefully apportioned the payments to be made out of them. It has long been the law that where a parliamentary body having parliamentary powers is allowed by parliament to receive money and is ordered by parliament to apply that money in a particular way, it is made personally responsible for its misapplication, however bonâ fide its conduct may have been. If, therefore, the appellants were to misapply, to purposes other than those pointed out in their statutes, money received by them, they would be liable to repay it out of their own pockets. That is how the matter would stand upon these Acts of Parliament had there never been any decision upon them or analogous Acts. Several decisions have, however, been cited

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to us, all of which are entirely consistent with or clearly distinguishable from the judgment which I am now delivering. The case most in point, and that seems to give most foundation for the respondents' argument, is that of *Conservators of the River Thames* v. *Victoria Station and Pimlico Ry. Co.* (1), in which it was decided that under a particular set of Acts of Parliament persons who had, if I may say so, no beneficial ownership, were nevertheless the owners and occupiers for the purposes of those Acts. Our present decision is, however, entirely consistent with that judgment. The conservators of the Thames are, no doubt, for certain purposes made owners of the soil; though they could not authorize an obstruction to the navigation, such as would to a certain extent be caused by a bridge and its piers, without contravening their own statutes. But in that case the authority of parliament had been invoked to enable a railway company to build a bridge over the river, and power to do so was given to the railway company; they could not, however, build it without to some extent encroaching upon the highway of the river, and encroaching, therefore, upon land which both by bargain and by statute had become vested for certain purposes in the conservators. For that reason the place was scheduled in the company's Act, the Lands Clauses Consolidation Act was incorporated, and the land was taken from the conservators, not willingly, but in invitum, and under the authority of parliament itself. But parliament, in authorizing the conservators to do what they could not have done without statutory authority, said very fairly that, as they were by this Act of Parliament empowered to break their own Act, they should be put in the same position as any other owner parting with his property, and should be paid for the land which but for the later Act they would have had no right to part with.

Other cases have been cited to us, including *Plumstead Board of Works* v. *British Land Co.* (2), where the very point was taken that is taken here. The question was whether the defendants were owners or occupiers of land; in the course of the arguments the case of *Angell* v. *Vestry of Paddington* (3) was cited, and the

(1) Law Rep. 4 C. P. 59. (2) Law Rep. 10 Q. B. 203.
(3) Law Rep. 3 Q. B. 714.

observation made upon that case in the judgment is: "The Court held in a short, but clear and determinate, judgment in *Angell* v. *Paddington* (1) that the trustees of a church, around which there was a piece of land, were not owners of either land or houses within the meaning of the statutes. Owners of land, for real property purposes, unquestionably they were; owners, too, of a house for certain purposes they were; but the Court of Queen's Bench looked, as we are doing, at the common sense of the thing, and they said it was plain that the trustees of a church were not the owners of land which could be let at a rack-rent within the meaning of the statute; and although they might come within the definition of holders of land and houses, that they were not within the meaning of holders of land or houses for the purposes of the sections in question."

I come, therefore, to the conclusion in this case that, although the appellants may have been, and no doubt are, for certain purposes occupiers and owners of the soil and foreshore of the Thames, they are not occupiers and owners of the soil and foreshore for the purposes of s. 4 of the Public Health (London) Act, 1891, and that the decision of the learned magistrate should be reversed.

MATHEW, J. I am of the same opinion, and I agree with my Lord in the construction that he has placed upon s. 4 of the Act of 1891 and the proviso to that section, and upon that ground alone I am satisfied that this conviction cannot be upheld.

But, apart from that, when we look at the statutes under which the conservators of the River Thames have been brought into existence, it seems to me clear that they hold whatever lands are given to them for certain specified purposes, and with the obligation upon them not to permit the lands to be used for any purpose which would interfere with the navigation of the river and would disturb that which is a common and public highway. There is not a trace in any of the Thames Conservancy Acts of any intention on the part of the legislature to impose upon them the obligation of removing any nuisance in or preventing the pollution of this part of the river, and that their duty is limited

(1) Law Rep. 3 Q. B. 714.

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with respect to the district in question is clear from a series of statutes which apply to the districts above and below it.

Further, the Acts of Parliament point out the purposes for which funds are to be employed and provide for their appropriation. There is not an indication in any of the sections relating to that subject of any intention that the funds should be employed for this purpose. The respondents' counsel argued that, although that might be the true construction of the Thames Conservancy Acts, the statute of 1891 imposed upon the appellants all the obligations of an ordinary owner. But that seems to me to be a most unreasonable construction. I cannot suppose that the legislature had in view owners of this peculiar kind as distinguished from ordinary owners of property, nor can I believe that, if any such obligation was intended to be imposed by the statute on the conservators, there would not be elaborate provisions to enable them to find the means to carry out what it is suggested they ought to do.

For these reasons I think that the order of the learned magistrate was wrong.

COLLINS, J. I am of the same opinion.

Appeal allowed.

Solicitor for appellants: *James Hughes.*

Solicitor for respondents: *H. Homewood Crawford.*

W. J. B.

[IN THE COURT OF APPEAL.]

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Feb. 5.

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County Court—Practice—Jurisdiction of Registrar—Non-appearance of Defendant at Hearing—Case taken as Undefended—Proof of Debt where Action commenced by Default Summons—Power to strike out Counter-claim—Prohibition—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 90—*County Court Rules*, 1889, *Order* XXII., *r.* 6.

In an action on a solicitor's bill, commenced by default summons in a county court, the defendant gave notice of defence, and also notice of a counter-claim for negligence. The case was called on during vacation, at a time when the judge of the county court was not sitting. The defendant did not appear, and the plaintiff applied for judgment. The registrar gave judgment for the plaintiff, without requiring proof of the debt, other than that supplied by the affidavit filed with the summons, and struck out the counter-claim. On an application for a prohibition to the judge of the county court from further proceeding in the matter of the judgment so obtained:—

Held (affirming the judgment of the Queen's Bench Division), that, even if the registrar was wrong in giving judgment without further proof of the debt, and had no authority to strike out the counter-claim, there was no ground for prohibition.

APPEAL from a judgment of the Queen's Bench Division refusing to grant a prohibition to the county court judge of Birmingham from further proceeding in the matter of the judgment obtained in the county court in this action.

The action was commenced by default summons in the county court of Birmingham to recover the amount of a solicitor's bill of costs. The defendant gave notice of defence, and also notice of set-off and counter-claim against the solicitor for negligence in the conduct of the matter in respect of which he claimed his costs. Notice of trial was given for September 14—a date at which, in consequence of the vacation, the judge would not be present. The case was called on in its turn before the registrar, and the defendant did not appear, and was not represented. The plaintiff thereupon applied for and obtained judgment, without proving that the debt was due and owing, otherwise than as appeared by the affidavit filed with the summons, and on his application the registrar struck out the counter-claim. Application was made next day to the registrar, on behalf

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of the defendant, for a rehearing, which was referred to the judge, who refused the application.

The defendant then applied to the Divisional Court (Wills and Wright, JJ.) for a prohibition to the judge of the county court from further proceeding in the matter of the judgment so obtained. This application was refused.

The defendant appealed.

1894. Jan. 11. *Yeatman*, and *Poley*, for the defendant. Order XXII. of the County Court Rules, 1889, is headed "Trial," and is only applicable to cases that come before a judge; and rule 6 of that order, which deals with the non-appearance of a plaintiff or defendant at the trial, did not entitle the registrar to dispose of the case, and consequently he could neither strike out the counter-claim nor adjudicate on the claim. The defence in tort raised an issue which the registrar was incompetent to try, and prohibition is the proper remedy: *Mayor of London* v. *Cox*. (1) Further, s. 90 of the County Courts Act, 1888, is general, and applies to default summonses, and the registrar, if he could entertain the matter at all, was bound to require proof of the debt being due and owing. (2)

A. T. Lawrence, for the plaintiff. The counter-claim was a tort founded on contract, and consequently both claim and counter-claim come within s. 90. The registrar could strike out the counter-claim, and then deal with the claim. It cannot be the meaning of s. 90 that a mere notice of defence is to oust the jurisdiction of the registrar, and no such limitation is to be found in the section. Even if the registrar was wrong in striking out the counter-claim, or in not requiring proof of the debt, these are matters for appeal, and they were in fact brought before the

(1) Law Rep. 2 H. L. 239.

(2) 51 & 52 Vict. c. 43, s. 90: "If in any action founded on contract a defendant shall not appear at the hearing, either in person or by some person duly authorized on his behalf, and no sufficient excuse for the defendant's absence shall be shewn, the registrar may, by leave of the judge, or in case of the judge's death or unavoidable absence, upon due proof of the service of the summons and of the debt being due and owing, enter up judgment for the plaintiff, and shall have the same power to make an order for payment by instalments, or to enter up judgment of non-suit, or to strike out or adjourn the action, as a judge would have. . . ."

judge by way of appeal. The defendant having another remedy has no right to ask for prohibition.

Yeatman, in reply.

Cur. adv. vult.

1894. Feb. 5. LOPES, L.J., read the following judgment. I am of opinion that prohibition should be refused. The registrar, in my opinion, had jurisdiction.

The summons in this case was a default summons issued under s. 86 of the County Courts Act, 1888, which permits a plaintiff suing for a debt or liquidated money demand to issue a default summons in the form prescribed by the Act, which is to be supported by an affidavit, and personally served on the defendant, and provides that if the defendant shall not within eight days after service of the summons give notice by post or otherwise in writing signed by himself or his solicitor to the registrar of the Court from which the summons issued of his intention to defend, the plaintiff may, after eight days and within two months from the date of the service, upon proof of the service or of an order for leave to proceed as if personal service had been effected, have judgment entered up against the defendant for the amount of his claim and costs.

The claim of the plaintiff was for a sum of money due in respect of a solicitor's bill of costs.

The defendant gave notice of his intention to defend, claiming a set-off and setting up a counter-claim.

Notice, dated July 29, 1893, was duly given to the plaintiff of defendant's intention to defend, and that the cause would be tried on the following September 14.

On September 14, it being the Vacation, the judge of the county court was not in attendance. The registrar, however, on that day sat to hear undefended cases, and this case was called on before him. The plaintiff appeared in person, but nobody appeared for the defendant. The case was called on a second time with a similar result, whereupon the plaintiff applied for judgment on his claim; and the registrar gave him judgment, striking out the set-off and counter-claim. No proof was given of the debt being due and owing.

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Next day an application was made to the registrar for a rehearing on the ground that he had no power to strike out the set-off and counter-claim. The registrar referred the matter to the judge, granting a stay in the meantime.

On October 2, defendant applied to the judge that the judgment should be set aside and the claim and counter-claim should be reinstated in the list for hearing upon the grounds that the registrar had no jurisdiction to hear the case after notice of set-off and counter-claim, and that the registrar had no power to sit in the absence of the judge; whereupon the judge dismissed the application with costs.

I have stated the facts at some length because it is an important case as affecting the jurisdiction of registrars of county courts.

The jurisdiction of the registrar of a county court is defined by s. 90 of the County Courts Act, 1888. It says, in any action founded on contract when a defendant shall not appear at the hearing, either in person or by some person duly authorized on his behalf, and no sufficient excuse for defendant's absence shall be shewn, the registrar may by leave of the judge (this leave was given here), upon due proof of the service of the summons and of the debt being due and owing, enter up judgment for the plaintiff, and shall have the same power to make an order for payment by instalments or to enter up judgment of non-suit or to strike out or adjourn the action as a judge would have; and such judgment shall be as valid as if both parties had attended the Court; but the judgment and any execution thereon may be set aside by the judge of the Court, and a new trial granted upon such terms, if any, as the judge may think just.

It was contended that this section does not apply to default summonses or to cases where notice of intention to defend had been given; but I can find no such limitation in the section. On the contrary, it appears to me to be of general application.

Each one of the requirements mentioned has been satisfied in this case except proof of the debt being due and owing: the defendant did not appear at the hearing either in person or by some person duly authorized on his behalf, no sufficient excuse for defendant's absence was shewn, and due proof of the service of the summons was given.

It is contended that proof of the debt being due and owing ought to have been given. Order XXII., r. 6, is relied on, and it is said proof of the debt being due and owing was unnecessary. That rule says that where a default summons has been issued and notice of defence given, and when the plaintiff appears and the defendant does not appear, judgment may be entered for the plaintiff without further proof. I am inclined to think that rule only applies when the hearing is before the judge.

It may be that the registrar made a mistake in not requiring proof of the debt being due and owing. Such a mistake, however, is not a ground for prohibition; it is a matter for appeal, not for prohibition.

The registrar, under s. 90, had, in the circumstances, jurisdiction to act. It was, in my judgment, the intention of the legislature to authorize the registrar to try undefended claims in actions founded on contract. This was an action founded on contract, being a claim by a solicitor for his bill of costs. It is true the defendant claimed a set-off and counter-claimed; but he did not appear to support either. The action was therefore undefended—as undefended as if the notice had not been given; and all the requirements of s. 90 were complied with except the non-proof of the debt being due and owing, with which I have already dealt.

It is said the registrar had no jurisdiction to strike out the set-off and counter-claim. Sect. 90 gives him power to strike out the action; and I should have thought, à fortiori, he might strike out a set-off and counter-claim which the defendant did not appear to support. But, again, if he was wrong in that, it would not be ground for prohibition.

The defendant, by appearing himself on September 14, either in person or by somebody duly authorized on his behalf, or by sufficiently excusing his absence, might have obviated the mischief of which he now complains. It is satisfactory, however, to know that, so far as the counter-claim is concerned, Mr. Lawrence is willing, without putting the defendant to the expense of an application to the Court, to agree that the counter-claim should be determined in the county court. I quite agree with what was said in the Court below with regard to including in the

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Lopes, L.J.

registrar's list cases where notice of intention to defend has been given. If the defendant had appeared, or if somebody duly authorized on his behalf had been present, and sufficient excuse for his absence had been given, the registrar could not have tried the case. It seems wanton to bring parties to the Court themselves or by authorized agents when their cases cannot be tried.

This appeal must be dismissed with costs.

DAVEY, L.J., read the following judgment. The difficulty in this case is to draw the line between what is excess of jurisdiction and what is at most an indiscretion. So far as the question challenges the exercise of the registrar's discretion, we cannot interfere by prohibition. I think that prohibition should be refused on the same grounds as were taken in the Court below, viz., that the order complained of was within the jurisdiction of the Court, and the matters alleged by the appellant shew at most irregularity only in the exercise of jurisdiction, and not excess of it.

I agree with Wills, J., that the practice which appears to be followed in the Birmingham County Court of publishing a list of cases (defended and undefended alike) to be tried on a day in vacation when it is known the judge will not be there and compelling parties to incur trouble, and it may be costs, by coming to say what they have already said by their defence, at the risk of having their defences struck out, is not at first sight one to be commended. I should have thought that a defendant who has put in his defence knows that his case can be tried only by the judge, and is entitled to assume that it will not be taken on a day when it is known that the judge will not be present in the Court. But I cannot say that the practice in itself involves any excess of jurisdiction, and I have no doubt it has been established with a view to the benefit of the suitors.

I am of opinion that an action in which a default summons has been issued is an action within the meaning of s. 90 of the County Courts Act, 1888. Under s. 86 the action is not commenced by the default summons, but there must be an action before the default summons can be issued. As this was an action founded on contract, it was within the provisions of

s. 90. The registrar seems to have accepted the plaintiff's affidavit and the non-compliance with the default summons as due proof of the debt being due and owing. I am not prepared to say he was wrong in so doing. The effect of the statutory provisions relating to a default summons (s. 86) and the rules relating thereto (see Order XXII., r. 6) is to make non-compliance with a default summons duly served and supported by the proper affidavit sufficient proof of the debt for the purpose of entering up judgment if no notice of defence is given. By rule 6, where notice of defence has been given and the defendant does not appear, judgment may be entered without further proof, which seems equivalent to saying that the case may be dealt with as if no notice of defence had been given. The provisions of s. 164 and the opening words of s. 86 give the rules statutory effect. I do not, however, think this point necessary for the decision of the case before us, because even if the registrar gave judgment on insufficient evidence of the debt, it would be irregularity only and matter for appeal, not for prohibition.

I am of opinion that the registrar had no jurisdiction to strike out the counter-claim; and I think that, as he could not deal with the whole matter, action, and counter-claim, it would have been better not to have given judgment in the action. But if, as I have said, he had jurisdiction to give judgment, this again would be an irregularity only which might have been set right on appeal. I therefore agree with the judgment of the Court below, that the act of the registrar in striking out the counter-claim is not ground for prohibition in the present case. We are, however, informed that the counter-claim has been set down for trial and will shortly be tried.

I am therefore of opinion that the appellant has taken an erroneous course in applying for a prohibition, and the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Harrison & Davies, for Hooper & Ryland, Birmingham.*

Solicitor for defendant: *F. K. Bull, for F. Shorthouse Bowen, Birmingham.*

A. M.

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1894
Feb. 1.

[IN THE COURT OF APPEAL.]

BROTHERTON *v.* METROPOLITAN DISTRICT RAILWAY JOINT COMMITTEE.

Practice—Costs—Costs of former Trial to abide "result" of new Trial—Recovery of One Farthing Damages in Action of Tort—Refusal of Certificate for Costs.

In an action of false imprisonment the Court of Appeal, in ordering a new trial, directed that the costs of the former trial should abide the result of the new trial. At the second trial the ury gave a verdict for the plaintiff, one farthing damages, and the judge refused to give the plaintiff a certificate for costs :—

Held, that the "result of the new trial" meant the result of that trial as to costs, and, therefore the plaintiff was not entitled to any costs of the first tria..

APPLICATION by plaintiff for a new trial.

The action, which was for false imprisonment, had been tried twice. On the first trial the learned judge before whom it was tried directed a verdict for the defendant. On application to the Court of Appeal that verdict was set aside and a new trial ordered, "the costs of the former trial to abide the result of the new trial." On the case going down again for trial the jury found a verdict for the plaintiff for one farthing damages, and the learned judge, before whom the case was tried, refused to give the plaintiff a certificate for costs. The plaintiff applied again to the Court of Appeal for a new trial, on the ground that the damages were inadequate. This application being refused,

F. H. Mellor, for the defendant, asked for the direction of the Court as to the effect of their former order upon the costs of the first trial, having regard to the result of the second trial. He contended that the meaning of the order was that the costs of the first trial should follow the result of the second trial with regard to costs, and therefore the plaintiff, not being entitled to the costs of the second trial, was not entitled to any costs of the first trial. [He cited *Fergusson* v. *Davison*. (1)]

Crispe, for the plaintiff, contrà.

(1) 8 Q. B. D. 470.

LORD ESHER, M.R. The part of the order in question related to costs only—to the costs of the first trial. It says, in effect, that the result with regard to the costs of the first trial is to be the same as the result of the second trial with regard to the costs of that trial. It seems to me clear that the "result" as used in that order means the result of the second trial so far as costs are concerned. If the result of the second trial is that the plaintiff has no costs of that, then the same result must follow as to the first trial.

LOPES and DAVEY, L.JJ., concurred.

Order accordingly.

Solicitor for plaintiff: *Edward Clarke.*

Solicitors for defendant: *Fowler, Perks, Hopkinson & Co.*

E. L.

[IN THE COURT OF APPEAL.]

HUGHES *v.* JUSTIN.

Practice—Writ indorsed for Liquidated Demand—Reduction of Amount by Payment—Judgment signed on Default of Appearance—Judgment for Amount actually due—Setting aside Judgment for larger Amount—Order XIII., *r.* 3.

When a writ of summons is indorsed for a liquidated demand, which is reduced by payment after writ issued, judgment on default of appearance ought only to be entered for the amount actually due at the time when such judgment is entered, and the defendant has a right to have any judgment entered for a larger amount set aside.

APPEAL from the judgment of the Queen's Bench Division (Mathew and Collins, JJ.), in favour of the plaintiff.

The defendant was indebted to the plaintiff, who instructed his solicitor to issue a writ to recover the amount due. A writ was accordingly issued indorsed for a liquidated demand. At a later hour on the same day the plaintiff and defendant met and discussed the questions of the indebtedness of the defendant, and of a claim which he asserted he had against the plaintiff. The result of the discussion was that a sum was agreed on which the defendant was to pay in settlement of the whole matter, and that sum was accordingly paid. At that time neither the

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plaintiff nor the defendant knew that the writ had been already issued, and nothing was said as to any costs that might have been already incurred in that respect. The writ was subsequently served on the defendant, who stated that the matter had been settled, and declined to have anything further to do with it. He did not appear, and judgment was signed. The judgment so signed was for debt and costs, but the sheriff was instructed to levy for the costs only. This was done, and the defendant paid out the sheriff, and then applied to a master to set aside the judgment and execution; this the master did, and his decision was confirmed by a judge at chambers. The plaintiff appealed to a Divisional Court who allowed the appeal.

The defendant appealed.

Colam, (*Morton Smith*, with him), for the defendant. The only thing due was the amount of the costs, and the judgment for debt and costs was irregular: *Hodges* v. *Callaghan* (1), and ought as a matter of right to be set aside: *Anlaby* v. *Prætorius*. (2)

Channell, Q.C., and *C. G. Ellis*, for the plaintiff. There is no legal obligation to restrict the signed judgment to the amount due at the time, provided the amount levied is correct. The only point in dispute up to this time has been whether the plaintiff was entitled to the costs of the action. The defendant complained of the execution issued for those costs, and the attention of the Divisional Court was not called to the irregularity (if any) in the mode in which judgment had been signed. The matter is one, not for striking out, but for amending the judgment entered, amendment having been made in the more serious case of the amount for which execution is directed being too great: *M'Cormack* v. *Melton*. (3)

[They cited *Huffer* v. *Allen*. (4)]

Colam, in reply.

LORD ESHER, M.R. The plaintiff directed the issue of a writ for a debt due to him. He was justified in so doing; but before

(1) 2 C. B. (N.S.) 306; 26 L. J. (C.P.) 171.

(2) 20 Q. B. D. 764.

(3) 1 A. & E. 331.

(4) Law Rep. 2 Ex. 15.

the writ was served the plaintiff and the defendant met, and I take the fact to be that neither knew that the writ had been issued. The plaintiff was claiming the money as due to him, and the defendant was asserting that he had a counter-claim. To settle the dispute between them they came to an agreement as to what sum the defendant should pay, and that amount was accordingly paid; but the question of any costs that might have been incurred if the writ had been already issued was not considered.

In my opinion, according to the true construction of Order XIII., r. 3, which is to the same effect as ss. 25 and 27 of the Common Law Procedure Act, 1852, although the plaintiff was within his rights in issuing the writ he was wrong in signing judgment for more than was then due, and as nothing was due he could only sign judgment for the costs. The judgment for the debt and costs was wrong, and *Anlaby* v. *Prætorius* (1) shews that the defendant has a right ex debito justitiæ to have it set aside. The master accordingly set aside the judgment and execution, and the plaintiff did not ask that any terms should be imposed on the defendant. The judge at chambers affirmed this decision. The case then came before the Divisional Court, and the plaintiff claimed that the judgment ought to stand for the amount for which it was entered and costs, and that the defendant ought to pay the costs of the summonses at chambers and of the motion, and he obtained the judgment of the Court to that effect. The only course open to the defendant was to appeal, and, as on the true construction of Order XIII., r. 3, he is, in our opinion, right, we must do what the Divisional Court should have done—that is, confirm the order setting aside the judgment.

We have to consider whether any terms should be imposed on the defendant as to costs. The plaintiff is only entitled to the costs up to signing judgment, and he cannot be entitled to the costs of signing an irregular judgment or to any subsequent costs. We therefore confirm the order to set aside the judgment; but on the terms that the plaintiff is allowed his costs up to but not including signing judgment, and he must pay all the costs of the proceedings to set aside the judgment, the defendant having

(1) 20 Q. B. D. 764.

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undertaken that there shall be no action in respect of anything done under the judgment.

LOPES, L.J. I am of the same opinion. The judgment signed was one which the plaintiff was not entitled to, and it must be set aside. The Divisional Court took a different view; but I do not think they would have done so if the case of *Hodges* v. *Callaghan* (1) had been brought to their notice. That was a case under s. 27 of the Common Law Procedure Act, 1852, under which, as under Order XIII., r. 3, the plaintiff might, in the case of a writ specially indorsed under s. 25, on the non-appearance of the defendant, sign judgment "for any sum not exceeding the sum indorsed on the writ." Willes, J., in giving judgment, said (at p. 314): "It is absurd to suppose that the statute intended to give an option to be exercised at the mere caprice of the plaintiff. The plaintiff ought to represent the Court as pronouncing judgment in his favour only for the sum which is really due to him." It appears to me that the defendant had a right, as pointed out in *Anlaby* v. *Prætorius* (2), to have the irregular judgment set aside, and that must be done, and the defendant will obtain his costs throughout on the terms stated by the Master of the Rolls.

DAVEY, L.J. I entirely agree.

Appeal allowed.

Solicitor for plaintiff: *George Castle.*
Solicitor for defendant: *Stanley Evans.*

(1) 2 C. B. (N.S.) 306; 26 L. J. (C.P.) 171.

(2) 20 Q. B. D. 764.

A. M.

[IN THE COURT OF APPEAL.]

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Jan. 16, 18, 19, 23, 24, 29.

MONSON *v.* TUSSAUDS LIMITED.
MONSON *v.* LOUIS TUSSAUD.

Libel—Injunction—Interlocutory Injunction pending Trial—Exhibition of Effigy whether Libellous—Question for Jury whether Plaintiff consented to Exhibition—Discretion—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

The plaintiff had been tried in Scotland upon a charge of murder by shooting with a gun. The jury returned a verdict of "Not proven." The proprietors of an exhibition of wax figures, representing celebrated and notorious personages, exhibited a portrait model of the plaintiff with a gun described as his gun. The figure was placed in a room within a turnstile, at which an extra sixpence was charged for admission. This room also contained figures of the Emperor Napoleon I. and three other persons, of whom one was convicted of murder, another committed suicide to avoid arrest, and another was a person charged with having been concerned in the alleged murder with which the plaintiff was charged, but who could not be found. There were other objects of interest in the room, such as relics of the Emperor Napoleon and the Duke of Wellington. From this room access could be obtained by descending some stairs, without further payment, to a room called the "Chamber of Horrors," in which were exhibited figures representing for the most part notorious murderers, and also relics and models of the scenes of murders. In this room there was a model of the spot where the murder with which plaintiff was charged was alleged to have taken place. The plaintiff sued the proprietors of the exhibition for libel, and applied for an interlocutory injunction to restrain the defendants from exhibiting the figure of himself pending the trial of the action. It appeared that the defendants did not intend to justify, the defence being simply that the exhibition was not libellous:—

Held, by the Queen's Bench Division (Mathew and Collins, JJ.), that the case was so clearly one of libel, that a verdict to the contrary ought to be set aside as unreasonable, and therefore, under the circumstances, an interlocutory injunction ought to be granted.

On appeal, it appeared from further affidavits filed that there would be a question at the trial whether the plaintiff had consented to the exhibition complained of:—

Held, by the Court of Appeal (Lord Halsbury, Lopes, L.J., and Davey, L.J.), that, that being so, according to the rule laid down in *Bonnard* v. *Perryman* ([1891] 2 Ch. 269), an interlocutory injunction ought not to be granted.

By Lord Halsbury: The decision in *Bonnard* v. *Perryman* ([1891] 2 Ch. 269) cannot be considered as laying down an absolute rule limiting the jurisdiction given to the Court by the Judicature Act, 1873, s. 25, sub-s. 8, to grant an injunction by interlocutory order where it shall appear to them to be just or convenient; and, but for the question raised by the further affidavits, a clear

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case of libel having been shewn to the Court, the injunction ought to have been granted.

By Lopes, L.J., and Davey, L.J.: The judgment of the Court of Appeal in *Bonnard* v. *Perryman* ([1891] 2 Ch. 269) lays down an absolute rule of practice with regard to the circumstances under which an interlocutory injunction ought to be granted pending the trial in actions of libel.

By Lopes, L.J.: There not being so clear a case of libel that a verdict to the contrary ought to be set aside as unreasonable, according to the rule in *Bonnard* v. *Perryman* ([1891] 2 Ch. 269), the injunction ought not to be granted.

By Lord Halsbury and Davey, L.J.: The jurisdiction to issue injunctions in cases of libel is not confined to cases of libels affecting a trade or business.

APPLICATIONS in the above-mentioned actions respectively for interim injunctions to restrain the defendants from publishing, exhibiting, or causing to be exhibited a portrait model of the plaintiff, or from advertising, announcing, and placarding the same in any way to the injury of the plaintiff, until the trial of the action or until further order. The indorsements on the writs claimed in substance injunctions to restrain the exhibition of the models and damages for libel.

The facts, so far as it appears necessary to state them for the purposes of this report, were as follows.

The plaintiff had been tried in Scotland upon a charge of having murdered a young man named Hambrough by shooting him with a gun at a place called Ardlamont. The defence to the charge was that Hambrough was killed by the accidental discharge of his own gun. The jury returned a verdict of "Not proven." Shortly after the trial the defendants in the first action, who were the proprietors of an exhibition in London, consisting mainly of wax figures of celebrated and notorious personages, placed in their exhibition a portrait model of the plaintiff, bearing his name, with a gun in close proximity thereto described as his gun. This figure was exhibited in a room called the Napoleon Room, No. 2, within a turnstile, at which an extra sixpence was charged for admission. In this room there were four other figures. Of these one was a recumbent figure of the Emperor Napoleon I., another that of a Mrs. Maybrick, who had been convicted of murder, another that of one Pigott, a witness before the Parnell Commission, who had committed suicide to avoid arrest, and another that of a man

named Scott, who was charged with having been concerned in the alleged murder with which the plaintiff was charged, but who could not be found. There were some other objects of interest in the room, for instance, relics of the Emperor Napoleon and the Duke of Wellington. From this room access could be obtained by descending some stairs without further payment to a room known as the "Chamber of Horrors," in which were exhibited figures, the bulk of which represented murderers and malefactors, and also relics connected with, and models of the scenes of, notorious murders. In this room there was a representation of the place where Hambrough's body was found described by the words "Ardlamont Mystery: Scene of the Tragedy."

The defendant in the second action was the proprietor of an exhibition of a similar nature at Birmingham, which also included a "Chamber of Horrors," for admission to which an extra charge was made. A figure of the plaintiff was exhibited in this exhibition. The figure was placed near others representing royal personages and political celebrities; and outside the "Chamber of Horrors" though in proximity thereto. It was always visible to the public without any extra charge or special division from the general exhibition. Advertisements of this exhibition were inserted by the defendant in various local newspapers, which ended with the words, "See the Chamber of Horrors (extra room, 3*d.*) and the instruments of torture—See Vaillant, the Anarchist, and Monson of Ardlamont. Admission to the Exhibition and Entertainment 6*d.*" It was stated in argument that the defendants did not intend to justify, the defence in both cases being simply that no imputation on the plaintiff's character was conveyed, and that the exhibition was not libellous.

Coleridge, Q.C., and *Cooper Wylde*, for the plaintiff.

H. Wace, and *E. A. Nepean*, (*Finlay, Q.C.*, and *Gye*, with them), for the defendants Tussauds, Limited.

T. Willes Chitty, and *Ernest Pollock*, for the defendant Louis Tussaud.

Cur. adv. vult.

Jan. 19. MATHEW, J. In the case of *Monson* v. *Tussauds Limited*, an application was made to us to restrain the defendants

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until the trial of the action from publishing or exhibiting, or causing to be exhibited, the portrait model of the plaintiff in their exhibition, and from advertising, announcing, and placarding the same, in any way to the injury of the plaintiff. The plaintiff asks for what is known as an interim injunction, and the ground of his application is that the exhibition of which he complains is calculated to disgrace him and to hold him up to public obloquy and contempt. During the hearing of the application it was agreed between the counsel on both sides that any right which the plaintiff had to complain of what the defendants have done depended on the principles underlying the law of libel, and it was not suggested that the exhibition could be interfered with on any other ground. The material facts were these. The plaintiff was tried in Scotland for the murder of Lieutenant Hambrough, and at the trial a man named Scott, who fled, was associated with the plaintiff in the charge. The trial ended in the verdict of the Scotch jury of "Not proven." Immediately after the trial this exhibition of the figure of the plaintiff commenced. The plaintiff complains that the exhibition directs public attention to him, and reminds the public that he has been suspected of an atrocious crime, and that the trial had the result I have mentioned. The defendants' case is that they intend to cast no imputation whatever upon the plaintiff, but they assert that he had become a notorious person, and they contend that, where a man had become notorious, either for creditable or discreditable reasons, they are at liberty to exhibit his effigy, and so to gratify the public curiosity which had been aroused with regard to him.

In dealing with this argument, it is of importance to have regard to the nature of the exhibition itself. The published catalogue gives a history of the show, and dwells, as one of its peculiar attractions, on the inclusion in the exhibition of what is known as the "Chamber of Horrors," which contains the effigies of malefactors and miscreants. This Chamber of Horrors was part of the original institution, and was preserved when the exhibition was removed from Paris to London.

The object of the exhibition is described in the following passages from the catalogue: "If the hour brought with it a

man or a woman famous or infamous the personage of that hour was forthwith modelled, coloured, dressed, and given an apportioned place in the Baker Street Galleries. . . . . During the forty-two years which have elapsed since the death of Madame Tussaud unremitting progress has been made in enhancing the variety, the historical accuracy and picturesqueness, and the general interest of the exhibition of which she was the founder." The exhibition, therefore, is the exhibition of the effigies of famous and infamous people whom the public might be expected to desire to see, and not of people who are of no personal interest to the public.

Now, what is the position in the exhibition of the figure of Monson? It appears from the affidavits that one part of the exhibition is given up to the effigies of persons who may justly be described as famous—famous, that is, for reasons creditable to themselves. In order to see the other part of the exhibition an extra fee is required, and there is a turnstile which, on the payment of 6*d.* each, admits the public to a room known as the "Napoleon Room," passing through which and descending some stairs the visitor finds himself in what is known as the "Chamber of Horrors," which contains the effigies of persons the majority of whom are deserving of execration. In this room there is a representation of the scene of what is known as the "Ardlamont mystery" or "Ardlamont tragedy"—that is to say, a representation of the spot in which Lieutenant Hambrough's body was found.

The effigy of Monson is not in the Chamber of Horrors. If it had been placed there, I do not see how it could possibly be contended that there was no imputation that he was one of the persons suspected of the murder of Lieutenant Hambrough, or that any other inference could be drawn than that his effigy was placed there in order to connect him with that tragedy or mystery. The figure is not there, but it is in the room above, within the turnstile, to which access can only be gained by the payment of 6*d.* at the turnstile, and through which it is necessary to pass in order to reach the Chamber of Horrors. In that room there are the figures of Mrs. Maybrick, who was convicted of murder, of Pigott, the witness in the Parnell Commission, of

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Monson, and of Scott. The names of the figures are appended to them; but there is nothing more. The room also contains some relics of the Great Napoleon and of the Duke of Wellington. Does it make any difference that the effigy of Monson is not placed in the Chamber of Horrors, but in the vestibule of that chamber? To my mind, it makes no difference at all. Of course, I am dealing with a question of fact and can only use my own judgment; but it is clear to me that it was intended by placing the effigy of Monson where it stands to connect him discreditably with the scene of the Ardlamont mystery which is depicted in the Chamber of Horrors, and the imputation is as clear as if a label had been placed on the figure: "This is Monson, who was suspected of the murder of Lieutenant Hambrough." Under those circumstances I am of opinion that a jury ought to find that an actionable wrong has been done to the plaintiff.

That being so, the only other question is whether we ought to exercise the power conferred upon us of restraining this exhibition until the trial of the action. That brings me to the second part of the case. The counsel for the defendants most strenuously resisted the suggestion that any imputation whatever was meant to be cast upon the plaintiff by this exhibition of his effigy. It was distinctly stated that the effigy is exhibited simply as being that of a notorious person; that the exhibition does not insinuate, far less charge, any offence against the plaintiff, and that there was no intention to set up a justification at the trial.

Our attention has been called to some familiar decisions of the Court of Appeal as to the rules which should control the interference of the Court in cases of this description. Those authorities relate to the law of libel, and to applications to restrain the publication of a libel until the trial of an action. The Court points out, where an application is made to restrain the publication of a libel before the trial of the action, what considerations must be dealt with before it will interfere. It ought not, it is said, as a general rule, to interfere unless it is so certain that any reasonable jury would give a verdict for the plaintiff that the judge would be bound to say that any other verdict was a perverse

or unreasonable one. Further, if the defendant intends to set up a justification at the trial, or if the injury done to the plaintiff can be fully compensated for in damages, the Court ought not to interfere by an interim injunction to restrain the publication of the libel until the trial of the action. Now, having regard to those principles, is this a case in which we ought to interfere? I have no doubt whatever that any jury ought to find, and would find, that what has been done is an actionable wrong, tending to disparage and injure the plaintiff; and we are, as I have said, relieved from all question of justification at the trial by the express admission of the defendants' counsel. Ought we, then, to abstain from interference on the ground that the wrong done to the plaintiff can be adequately compensated for in damages? In dealing with that question, it must be borne in mind that as between the plaintiff and the defendants, he must be treated as an innocent man. Can it be contended that any payment of money could compensate an innocent man for the injury and misery which would result to him from continuing the exhibition of his effigy? I think not. In my opinion, irreparable mischief would be done if the defendants were permitted to exhibit this effigy until the trial of the action, and if the public were thus continuously reminded that the suspicion of an atrocious crime had rested upon the plaintiff. I am clearly, therefore, of opinion that in the first case an injunction must go to restrain the defendants from any further exhibition of this effigy.

In the second case, that of *Monson* v. *Louis Tussaud*, the facts are no doubt somewhat different. The defendant is the proprietor of a small exhibition at Birmingham, of famous and infamous persons, in which also there is a Chamber of Horrors, admission to which entails the payment of an extra fee. The effigy of the plaintiff is not placed in that Chamber of Horrors, but is placed near the turnstile leading to it, where payment is made. Why is it placed there? Is it because he is treated as famous or as infamous—as honourably or discreditably distinguished? The advertisements which were inserted in the newspapers, and which were also carried about by sandwich-men, answer that question. The public are invited to "See the Chamber of Horrors (extra room 3*d.*), and the instruments of

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torture—See Vaillant, the Anarchist, and Monson of Ardlamont." That is the company in which the plaintiff's name is placed. It is true that his effigy is not placed with Vaillant in the Chamber of Horrors, but I am unable to draw any satisfactory distinction between the two cases. Mr. Chitty, for the defendant Louis Tussaud, urged us to give separate consideration to each case, and we have done so; but there seems to be no distinction in principle between them. It was suggested during the argument that there was no difference between this case and that of a newspaper which might publish the plaintiff's portrait, and it was asked whether any exhibition of Monson's portrait must be actionable. The answer is No, because a newspaper is entitled in the public interest to refer to, describe, and comment upon any public occurrence, provided that the description is fair and accurate. The cases are not analogous. But suppose that for the purposes of a newspaper mainly devoted to chronicling criminal cases it was found worth while to shadow a man who had been acquitted of a crime, to take portraits of him and to publish them, stating that they were the portraits of the man who had been tried in such and such a case, would that be actionable? Is it possible to doubt that such a newspaper would be a sharp instrument of torture, and an outrage on the man's comfort and peace? That is really analogous to what has been done here.

In this as in the last case, it is admitted that no imputation of any kind upon the plaintiff is intended, and the defendant relies on the same answer, that the notoriety of a person, whether for good or evil, justifies the exhibition of his effigy. The defendant does not seek to justify, and will not attempt to justify, any charge of criminal conduct at the trial. This case, therefore, contains no different factor and presents no greater difficulty than the other case, and an injunction must go in similar terms.

COLLINS, J. I am of the same opinion, and I need add but very few words to what has been said by Mathew, J. The law is clearly settled that a person may be defamed as well by a picture or effigy as by written or spoken words. This case has to be dealt with by the standard applicable to an action for libel.

I do not wish to express any opinion on the question whether a private person can restrain the publication of a portrait or effigy of himself which has been obtained without his authority. That is quite a different question. Applying therefore the standard of a libel action to this application to restrain the exhibition of an effigy of the plaintiff, we have to consider first whether the libel is established, and, secondly, whether it is such as to call for and justify the interference of the Court by an interim injunction. When the matter comes to be analysed it falls into a very small compass, and we are relieved in the present case from difficulties which often exist. The counsel for both the defendants have told us that the real question is whether the public exhibition of an effigy of the plaintiff for money amounts to an injurious imputation upon him. They both absolutely disclaim any intention to justify any innuendo or imputation upon the plaintiff, and their case is that no imputation of any kind is intended by such exhibition. Unquestionably there are distinctions in point of fact between the two cases, and perhaps the London case is more clear than the Birmingham one; but the differing facts appear to me to affect only the fringe of the cases and to leave the principle untouched. We have to consider the object for which the figure is exhibited and the manner in which that object is carried out. The exhibitions are exhibitions for money of the effigies of famous or infamous people, as the catalogue and advertisements shew. No effigies of private persons are found there unless such persons have obtained notoriety or fame. Why, then, is the effigy of Monson placed there, and why is public attention invited to it? Is it because he was present at Ardlamont as a casual spectator when through an unfortunate accident Lieutenant Hambrough was shot? Can it be suggested that every person who was present at a grouse drive, for instance, when some member of the party was accidentally shot would acquire a title to have his effigy placed in these exhibitions? Is the mere presence of the plaintiff at the tragedy a ground for the inclusion of his effigy? It is clear that it is not. The only ground for the exhibition of his effigy must be, therefore, that what happened at Ardlamont was not an accident but a crime, and that he was in some way or

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another mixed up with that crime. That can be the only reason for placing his effigy in these exhibitions and advertising it in the manner proved. When the contents and the manner of exhibition of these shows are considered it is perfectly clear that to place an effigy of the plaintiff in them and to demand money for shewing it is necessarily to convey a sinister imputation that he was connected with a crime, and not that he was a spectator of an accident. Under these circumstances it seems to me that the inference which any reasonable jury would draw is inevitable, i.e., that an imputation is made on the plaintiff and that the exhibition of the effigy is a libel upon him. The first condition required by the Court of Appeal is therefore fulfilled. In my opinion, if the jury were to say that there was no libel because no imputation was cast on the plaintiff by the inclusion of his effigy in the defendants' exhibitions, their verdict would be so unreasonable that it ought to be set aside and a new trial granted. But the matter does not stop there, because the Court of Appeal has laid down in the case already cited that, although the libel may be clear, yet, if it is apparent that a justification will be set up at the trial or that the injury is so slight that the plaintiff would recover nominal damages only, the Court will not interfere by interim injunction. Any intention to justify any imputation on the plaintiff has been in terms disclaimed, as I have said, and the second condition of the Court of Appeal has been complied with. The only question, therefore, that is left is whether it can be contended that the libel thus unjustified is a mere matter for nominal damages. That has hardly been suggested, and if suggested could certainly not be sustained. It is obvious that, where such an imputation is conveyed by such means and merely to gratify a morbid curiosity, the damages must be substantial. All the conditions laid down by the Court of Appeal have therefore been fulfilled, and the Court is consequently justified in interfering. I agree without hesitation that an injunction must go in both cases.

Applications granted.

A. P. P. K.

The defendants in both actions appealed.

In the Court of Appeal further affidavits were filed on both sides in the first-mentioned action, the substance of which was as follows: The affidavits filed by the defendants were to the effect that, shortly after the figure of the plaintiff was first exhibited by the defendants, a person named Tottenham had called on a director of the defendants' company at their offices, and stated that he knew the plaintiff well and came on his behalf, and had entered into an agreement for the sale to the defendants of a suit of shooting clothes, stated to have been worn by the plaintiff at Ardlamont on the day of the alleged murder, and a gun used by the plaintiff on that day, and that the plaintiff should give them a sitting in order to improve the portrait model of himself, for the sum of 100*l.*; that Tottenham subsequently handed over the gun and suit of clothes to the defendants and received a cheque for 50*l.* on account, giving a receipt embodying the terms of the agreement; but that he afterwards wrote returning the cheque, and stating that the plaintiff refused to confirm the arrangement he had made, and was much annoyed with him for going so far without consulting the plaintiff, and asking for the return of the clothes and gun. It was stated in the defendants' affidavits that information had appeared in the newspapers to the effect that the plaintiff was about to publish a pamphlet on the "Ardlamont Mystery," and that advertisements had been issued of lectures to be delivered by the plaintiff on the subject of the Ardlamont case.

Counter affidavits were filed by the plaintiff. One of these was an affidavit by Tottenham to the effect that the plaintiff had left at his office a portmanteau containing the clothes and gun; that he had, hoping to obtain the sanction of the plaintiff, seeing that the plaintiff was in his debt at the time, offered the clothes and gun to the defendants for 50*l.* on the understanding that if the plaintiff did not acquiesce in what he had done they should be returned and the money repaid; that he had also agreed that the defendants should give him a further 50*l.* if he could induce the plaintiff to give them a sitting; and that he did this entirely on his own responsibility, and without previous communication with the plaintiff; but on informing the plaintiff what he had done, the plaintiff was indignant and refused to give his consent,

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and desired him to obtain possession of the clothes and gun. The plaintiff also made an affidavit to the effect that he never gave any authority to Tottenham or any other person to part with the clothes or gun, and was extremely annoyed when informed by him that he had done so, and absolutely refused to give his consent to the transaction; and that no such lectures as advertised had ever taken place, nor did he intend to give such lectures, and, the idea having been once entertained on the impulse of the moment, was immediately and entirely abandoned, and that he never authorized directly or indirectly the insertion of the advertisements of such lectures.

Jan. 23, 24. *Finlay, Q.C.*, and *Gye*, (*H. Wace*, with them), for the defendants in the first action. The reasonable inference from the matters stated in the fresh affidavits is, that the plaintiff authorized his friend to make the arrangement which he made with the defendants, though he afterwards changed his mind. The plaintiff's affidavits in answer are not satisfactory. There is matter requiring to be tested by cross-examination of the plaintiff and his witnesses at the trial. Under these circumstances it is apparent that there will be a substantial question for the jury, whether the plaintiff consented in the first instance to the exhibition complained of. That being so, the case is not one in which an interlocutory injunction can be granted according to the rule laid down in *Bonnard* v. *Perryman*. (1) It was held in that case that an interlocutory injunction ought only to be granted in an action of libel where the libel was so clear that, if the jury found no libel, the verdict would be set aside as unreasonable. The defendants' case is that the exhibition of this model does not import anything libellous of the plaintiff. It does not import that the plaintiff was guilty or reasonably suspected of murder. The defendants exhibit models of persons in whom the public for whatever reason take interest. What they have done is simply to exhibit a model of the plaintiff as a person in whom the public was interested as connected with a case which excited great public interest. If what the defendants did amounted to a libel, it would be libellous to publish portraits

(1) [1891] 2 Ch. 269.

of persons, tried and acquitted on criminal charges, in an illustrated paper, or photographs of such persons. In any case, it is essentially a question for the jury whether under such circumstances as these the exhibition imports a libel. There is the greatest difficulty and risk of prejudice involved in anticipating the verdict of a jury on a question which since Fox's Act has always been held to be peculiarly one for them. Before the Judicature Act the Court of Chancery had no jurisdiction to restrain the publication of a libel: *Prudential Assurance Co.* v. *Knott.* (1) It has been held since the jurisdiction was given that it is one of a very delicate nature, which ought only to be exercised with the greatest caution and in the clearest possible cases—that is to say, where a verdict of no libel would be so unreasonable as to be set aside: *Coulson* v. *Coulson.* (2)

The instances in which Courts have interfered by way of injunction in such cases are cases of injury to a trade or business such as there was in *Liverpool Household Stores Association* v. *Smith.* (3)

Willes Chitty, and *Ernest Pollock,* for the defendant in the second action.

Bernard Coleridge, Q.C., and *Cooper Wylde,* for the plaintiff. The exhibition of the model of the plaintiff under the circumstances clearly amounted to an innuendo disparaging to the plaintiff's character. It either imports that he was guilty or that he was reasonably suspected of murder. The publication of portraits of accused persons in newspapers at the time of a trial is not analogous. The question is whether, after a man has stood his trial and the proceedings are over, the defendants are legally entitled for gain to themselves to pander to a morbid curiosity and keep the matter from day to day constantly before the public to the injury of the plaintiff's reputation.

The power to grant an injunction in case of libel is derived from s. 25, sub-s. 8, of the Judicature Act, 1873, which says that an injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just and reasonable that such order shall be made. There is

(1) Law Rep. 10 Ch. 142. (2) 3 Times L. R. 846.
(3) 37 Ch. D. 170.

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nothing to confine this power to the case of libels affecting trade or business. In the case of *Bonnard* v. *Perryman* (1) the injunction was refused because the defendant was going to justify the libel. No doubt the Lord Chief Justice, in giving the judgment of the Court of Appeal, adopted the language of Lord Esher, M.R., in *Coulson* v. *Coulson* (2), where he said that the jurisdiction ought only to be exercised in the clearest cases, and gave, by way of example, cases where the verdict, if in favour of the defendant, would be set aside as unreasonable. If this was intended to be laid down as a hard-and-fast rule, it would really be importing a limitation into the words of the Judicature Act which is not therein contained. There is no greater difficulty or risk of prejudice in the case of libel than in any other case tried before a jury. It might always be said that an interlocutory injunction would prejudice the trial of the case by the jury. [They cited on this point: *Thomas* v. *Williams* (3); *Salomons* v. *Knight* (4); *Parmiter* v. *Coupland* (5); *McDougall* v. *Knight* (6); *Capital and Counties Bank* v. *Henty* (7); *Quartz Hill Consolidated Gold Mining Co.* v. *Beall* (8); *Beddow* v. *Beddow* (9); *Shaw* v. *Earl of Jersey.* (10)]

With regard to the fresh affidavits, it is contended that the plaintiff's affidavits satisfactorily negative the suggestion that he ever consented, or that his friend was authorized by him to consent, to this exhibition.

Finlay, Q.C., and *Chitty*, in reply.

Cur. adv. vult.

Jan. 29. LORD HALSBURY. Although I believe there is no difference of opinion among us as to the result of this appeal, I am not so certain that the grounds upon which we act are the same, and the questions raised at the bar are of such serious general importance that I feel it necessary to explain distinctly the reasons which operate on my mind in the course to be pursued. If the case were to be argued upon the materials which

(1) [1891] 2 Ch. 269.
(2) 3 Times L. R. 846.
(3) 14 Ch. D. 864.
(4) [1891] 2 Ch. 294.
(5) 6 M. & W. 105.
(6) 17 Q. B. D. 636.
(7) 7 App. Cas. 741.
(8) 20 Ch. D. 501, at p. 508.
(9) 9 Ch. D. 89.
(10) 4 C. P. D. 120.

alone were before the Divisional Court, I should be of opinion that the judgment of the Divisional Court ought to be affirmed. I entirely agree in the reasoning of my brothers Mathew and Henn Collins; but, for a reason I will state presently, I desire to treat separately the question of the summary intervention of the Court by way of interlocutory injunction and the question of the character of the exhibition, the continuance of which until the trial it is sought to restrain. What stands at the head of the inquiry is the character of the exhibition itself. Is it libellous or no?—and in expressing my opinion upon it I am not afraid of prejudicing any right by so doing. The jury will have upon the trial of the action to decide the question ultimately, and I have much too high an opinion of the intelligence of juries to suppose that they would be influenced in their judgment if they learned that a judge or a Court had thought that the continuance of an exhibition charged as libellous ought to be restrained until the matter came before them for decision. Indeed, it is a little singular to suppose, considering the controversies which used to arise before Mr. Fox's Act, that a jury would on such a question be unduly influenced by the opinion of a judge or a Court.

Now this exhibition consists of a portrait model of a person recently tried for murder, the gun with which the murder was said to be perpetrated placed in immediate proximity to the figure, and, in another part of the same establishment, a model or scenic representation of the place where it was alleged the murder took place. If it stopped there I should have thought that there was enough to make it a very grave and defamatory exhibition. It seems to be thought that, because it could be said that it was true that the applicant was tried for murder, this is of itself a sufficient answer. It seems to me that this is no answer at all. Because the applicant was tried for murder, and because the circumstances of the trial are commonly known by the reports of proceedings in a court of justice, privileged, be it observed, because they are such reports, this does not justify the unauthorized and unprivileged repetition as a narrative of circumstances of suspicion or of evidence, which certainly were urged by the proper authority as proving that he was guilty of murder. In order to justify a libel the justification must justify

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in the sense attributed by the innuendo. It is not the mere words of a written statement being true, or the accuracy of fact in a model or scene represented which will render it justifiable. The circumstances of time or place may raise such inferences as will render either libellous, though the words may be true and the model exact. Lord Blackburn, in giving judgment in the *Capital and Counties Bank* v. *Henty* (1), deals with this very question. After expressing his reluctance to express his opinion on cases not before him, he continues: "I think I may safely say that in a time of panic a statement published in a City article of one of our newspapers that such an one had withdrawn his account from such a bank might have a tendency to shake the credit of that bank, and would very probably be understood by such persons as came for information as conveying an imputation upon the credit of that bank." In the same case it was laid down that the test as to whether a writing is a libel or no is whether, under the circumstances in which the writing was published, reasonable men would be likely to understand it in a libellous sense.

Now it is urged here that no meaning can be attached to this representation calculated to bring the person whose portrait model is exhibited into hatred, contempt, or ridicule, and that therefore, inasmuch as everybody, or most people, knew that Mr. Monson was tried for murder, it is justifiable to exhibit his portrait as that of the man who was so tried, the weapon with which the murder was alleged to have been committed, and the scene of its commission. That the exhibition amounts to no more than writing, "This is the man who was tried for murder said to be committed by this weapon and in this place." I will assume for the moment that that is a fair representation of what the exhibition means; but I wholly dispute that, if that were the meaning, it would not be libellous. Is it true that you may write with impunity that a person in the course of his career has been tried for some offence? Is it no reflection upon a man's character to say that he has been tried for murder? Will people as readily associate with and accept the companionship of a person of whom such things are said? Let it be observed, I am

(1) 7 App. Cas. at p. 786.

speaking now of the character of the imputation, and not for the moment dealing with the question whether it could be justified on the ground that it was true. If I understand the argument correctly, it comes to this—that the exhibition in question is dedicated to the gratification of public curiosity in regard to every person or event which may for the moment be interesting. I confess I regard such a claim with something like dismay. Is it possible to say that everything which has once been known may be reproduced with impunity in print or picture; every incident of a criminal or other trial be produced, and its publication justified; not only trials, but every incident which has actually happened in private life, furnish material for the adventurous exhibitor, dramatized peradventure, and justified because, in truth, such an incident did really happen? That it is done for gain does not in itself make it unlawful if it be in other respects legitimate; but it is not altogether immaterial as excluding such a publication from the category of those which are made in the fulfilment of some moral or legal duty. It seems to be assumed that there is no alternative between an innuendo which shall charge the commission of the murder and the admission that no real imputation is conveyed. I think that is an erroneous view. Suppose the innuendo to be that he was a person of ill-repute. The justification must allege, not that he was tried for murder, but that he was of ill-repute. If it were otherwise, this singular result would follow: That if a man has been convicted and undergone his punishment for crime, the law will protect his reputation (see *Leyman* v. *Latimer* (1), and *Cuddington* v. *Wilkins* (2)); but if he has been acquitted, his reputation is at the mercy of idle gossip for the rest of his life. I have hitherto said nothing of the associations which, to my mind, are almost necessarily connected with the imputation of crime. I have nothing to do with the intention of the exhibitors. It may well be that the extra 6*d.* charged, because Mr. Monson is for the moment the favourite object of curiosity, may, for aught I know to the contrary, have caused the model to have been placed where it is because it is the most convenient place for charging the extra 6*d.* But what is the impression

(1) 3 Ex. D. 15, 352. (2) Hob. 67, 81.

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which would be created on the minds of reasonable men by the juxtaposition of Mr. Monson's model, Mrs. Maybrick's, Scott's, and Pigott's? I think no answer was attempted to be given to Mr. Coleridge's question, Is there any one instance of a victim of an accident or an innocent man being exhibited in this part of the establishment? It is, indeed, suggested that a recumbent figure of the Emperor Napoleon is in the same room; but the answer seems to me to be wholly insufficient. If Mr. Monson were a public character, with respect to whom it might be said that his public life or his great position is calculated to create an interest, the answer might be plausible; but who knows, or ever did know, anything about Mr. Monson except his connection with the alleged murder at Ardlamont? And why, then, is he placed near a convicted prisoner, one fugitive from justice not yet captured, and another who escaped justice by suicide? If one adds to that that the scene of the alleged murder is also represented, and admission gained to it by the same fee, and in the place wherein are stored the effigies of many convicted criminals and some scenes of crime, it is a bold assertion to maintain that to the ordinary mind such an association of circumstances suggests no imputation of guilt.

But I have now to deal with the question of the summary interposition of the Court restraining the continuance of this exhibition until the trial of the action. Two points arise upon it. In the first place, it is said that the Court ought not to pronounce anything to be a libel when that very question must afterwards be submitted to the judgment of a jury; and, secondly, that the question has already been concluded by authority in this Court. Sitting here, I quite admit that I am bound by a former decision of this Court. With respect to the first point, my answer is that the legislature in 1873 and 1875 gave the power by the unqualified language of its enactment to do the very thing in question wherever the Court should deem it just and convenient. Had it thought right to limit the exercise of such power to cases where no question should be afterwards determined by a jury, it might have limited the exercise of such a power to such cases. It cannot be assumed to be ignorant of the state of the law or the practice, and it has

enacted in the widest terms the jurisdiction in question. It is not necessary to enumerate, but there are other examples of jurisdictions where judges must exercise, in the first instance, a judgment which must, nevertheless, afterwards be submitted to a jury.

The second objection is one with which I have more delicacy in dealing. As I have already said, I am bound by a former decision of this Court, but it is the decision of the Court—what in fact the Court did decide—that is the authority to which I must submit. I have some difficulty in following the argument that a decision of the Court on one set of facts is an authority upon another and a totally different set of facts. Of course, if the two sets of facts are governed by some principle of law, the principle of law affirmed by the Court is equally authoritative to whatever facts the principle may be applied; but where the strength and cogency of the facts themselves, or the inference derived therefrom, is in debate, I cannot, as a matter of reasoning, compare one set of facts with another and bring them within any governing principle. Nor am I helped by a conjecture as to what a jury would do in a supposed case and what a Court of review would then do if the jury did it. In the case of *Bonnard* v. *Perryman* (1), affirming the former authority before the Master of the Rolls, it was laid down, and I cheerfully accept the proposition, that the Court ought not to interfere by interlocutory injunction unless it was "a clear case." Different forms of expression are used by different judges to indicate the degree of clearness which ought to be brought home to the mind of a judge before he exercises the power now in question. But it is a canon of construction too familiar to render more than an allusion to it necessary, that expressions however general and phrases however wide are cut down and qualified by the subject-matter with respect to which they are uttered. If I were to understand the test suggested to be applicable to all cases, so that it practically excluded actions of libel from the operation of the Judicature Acts with respect to granting interlocutory injunctions, it would be to overrule the legislature—a power which is not possessed either by this or any

(1) [1891] 2 Ch. 269.

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other Court. But, as I have said, I do not so understand the decisions relied upon. The last one speaks of the procedure in question as being only just and convenient in exceptional cases—that is, exceptionally clear cases. Something was said as to the procedure being only applicable to trade libels. I think the suggestion is quite unfounded. The Court of Chancery had no jurisdiction in libel cases; but they had jurisdiction to issue injunctions to restrain injuries to trade; and efforts were occasionally made to treat libels as injuries to trade, so as to bring them within the jurisdiction which the Court of Chancery was empowered lawfully to exercise; but, whatever may have been the interest of such discussions, the Judicature Acts have rendered all of them idle. In all cases where the Court shall think it just and convenient the remedy exists. I should have thought the protection of a man's character much more important than the protection of his trade: see *Hermann Loog* v. *Bean*. (1) I do not deny that it is a difficult task for any Court to determine when the case is so clear that the remedy ought to be applied. In this case it is for the jury, and always would have been for the jury, to determine the question, libel or no libel; since in the unanimous opinion of the judges given to the House of Lords in 1792 (2), while adhering to Lord Mansfield's opinion as to the construction of a written document (3), they frankly admitted that wherever the sense of a paper was to be collected from matter dehors the paper the matter was for the jury; and it need hardly be stated here that "libel or no libel" in this case must be absolutely for the jury. A rule, however, which should place the question of libel or no libel absolutely in the hands of the Court so as to control the operation of an Act of Parliament would go far to revive a controversy which has now been laid to rest for upwards of a century: see Baron Parke's observations in *Parmiter* v. *Coupland* (4); and for this among other reasons I cannot think that the decisions referred to are to be understood in the sense contended for. In the view, therefore, that I take of the facts, I should have thought this

(1) 26 Ch. D. 306.
(2) See 22 How. State Trials, 298.
(3) See *Woodfall's Case*, 20 How. State Trials 895, and 5 Burr. 2661.
(4) 6 M. & W. 105.

was a clear case of libel, and an equally clear case for the prompt interference of the Court to restrain it until the trial of the action.

The question, however, remains whether the new evidence adduced, and which was not before the Divisional Court at all, alters that view; and I am of opinion that it does. Of course, if the exhibition in question is made with the consent, expressed or implied, of the applicant for the injunction, there is no ground for the application. Now, the facts may be very shortly stated. The confidential friend of the applicant entered into a written bargain with the proprietors of this exhibition (Madame Tussaud's) to supply them with the clothing and the gun which Mr. Monson was using at the time of Lieutenant Hambrough's death, and an agreement to give a sitting by Mr. Monson to aid the portrait modeller. If this was done with Mr. Monson's authority, there is, of course, an end of the question. Now, in discussing this matter, I am anxious not to prejudice any inquiry which may hereafter be held into these matters. It is enough to say that upon the correspondence and the affidavits of Mr. Monson and Mr. Tottenham it is very doubtful indeed to my mind how a jury would find, or what further investigation might disclose. And I think that in this state of the evidence, the views expressed in the two cases referred to above (1) are binding upon me, and I think, therefore, that this injunction must be dissolved. For reasons already given, the same course will be followed in the Birmingham case; since, if such an exhibition was permitted by the plaintiff in London, the Court would not restrain it by interlocutory injunction in Birmingham.

LOPES, L.J. These are two appeals from orders of the Divisional Court granting interlocutory injunctions to restrain the defendants from respectively exhibiting or advertising the exhibition of a wax model representing the plaintiff.

The facts of the Ardlamont case are too well known to require recapitulation; suffice it for the purposes of this appeal to say

(1) See *Bonnard* v. *Perryman*, [1891] 2 Ch. 269; *Coulson* v. *Coulson*, 3 Times L. R. 846.

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that the plaintiff was tried in the Ardlamont case at Edinburgh before the Lord Justice Clerk and a jury, and the jury found a verdict of "Not proven."

Shortly after the trial the defendants respectively exhibited wax models representing the plaintiff at their respective establishments. I propose to deal only with the facts in the first case. The facts in the second are practically the same, and the second case must follow the decision in the first.

The ground of the application for an interlocutory injunction was that the exhibition of which the plaintiff complains was calculated to disgrace him and to expose him to public obloquy and contempt, and was, therefore, a libel upon him.

The facts with regard to the exhibition of the wax model so far as material are as follows: The figure of the plaintiff was in a room called "Napoleon Room, No. 2," within a turnstile where an extra 6*d.* was demanded. In this room there were five figures: a large recumbent figure of the Emperor Napoleon, a figure of Mrs. Maybrick, another of Pigott, another of Scott, and one of the plaintiff, with their respective names. There were other objects of interest in the same room—for instance, relics of the Emperor Napoleon and the Duke of Wellington. From the room you could descend a staircase, and then find yourself in what is called "The Chamber of Horrors," where there was a representation of what is called "The Scene of the Ardlamont Mystery."

Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel. The plaintiff's case, therefore, is libel, and this application for an interlocutory injunction must be determined upon the principles which are applicable to the granting of injunctions in cases of libel. It must be borne in mind that the question is not whether what is done is libellous, but whether a case for an interlocutory injunction is made out. Prior to the Common Law Procedure Act, 1854, no Court could grant any injunction in a case of libel. The Court of Chancery could grant no injunction in such a case, because it could not try a libel. Neither could Courts of Common Law until the Common

Law Procedure Act of 1854, because they had no power to grant injunctions. Whether they had power to grant an interlocutory injunction after 1854 I think doubtful. As a matter of practice they never did. The first instance of exercising the power of granting an injunction in libel was *Saxby* v. *Easterbrook* in 1878 (1), and that after trial. The Judicature Act of 1873, s. 25, sub-s. 8, confers a larger jurisdiction to grant injunctions than existed before. It says, "A mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." It is upon this section that the plaintiff rests his case. It is not necessary to consider cases that occurred before the coming into operation of the Judicature Acts. *Coulson* v. *Coulson* (2) was decided in 1887, and contains a judgment of the present Master of the Rolls which underlies every subsequent decision on the subject. It is reported in the *Times Law Reports* for 1887, and at p. 846 the Master of the Rolls (Lord Esher) says that "it could not be denied that the Court had jurisdiction to grant an interim injunction before trial. It was, however, a most delicate jurisdiction to exercise, because, though Fox's Act only applied to indictments and informations for libel, the practice under that Act had been followed in civil actions for libel, that the question of libel or no libel was for the jury. It was for the jury and not for the Court to construe the document and to say whether it was a libel or not. To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel before the jury decided whether it was a libel or not. Therefore, the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all probability the alleged libel was untrue, and, if written on a privileged occasion, that there was malice on the part of the defendant. It followed from those three rules that the Court could only on the rarest occasions exercise the jurisdiction." In the same year the case of *Liverpool Household Stores Association*

(1) 3 C. P. D. 339. (2) 3 Times L. R. 846.

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v. *Smith* (1) came before the late Cotton, L.J., and myself in this Court, and *Coulson* v. *Coulson* (2) was followed and approved. The matter of restraining libels on interlocutory motions for injunction was thought of such importance that the question was, in *Bonnard* v. *Perryman* (3), argued before the full Court of Appeal, and Lord Coleridge, in delivering the considered judgment of the Court, said: "We entirely approve of, and desire to adopt as our view, the language of Lord Esher in *Coulson* v. *Coulson*. (2) To justify the Court in granting an injunction it must come to a decision upon the question of libel or no libel before the jury have decided whether it was a libel or not. Therefore the jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous and where, if the jury did not so find, the Court would set aside the verdict as unreasonable." I cannot help thinking that a principle was laid down in this case applicable to all libels without limitation. Comment has been made on the words "in the clearest cases," and it has been asked what those words mean. I think the criticism would be well founded, and they might be complained of as indefinite, if they had not been in my judgment explained in the most exhaustive way by what follows, viz., "where any jury would say the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable." This is the rule by which we are bound, and I ask myself, if the jury found a verdict for the defendants in this case, would the Court set it aside as unreasonable?

I propose first to deal with the case as it came before the Divisional Court, and, secondly, as it has come before this Court with the additional evidence. I do not think that the Divisional Court were justified in coming to the conclusion that the libel was so clear that if a verdict passed for the defendants it must be set aside as unreasonable. Mr. Coleridge, for the plaintiff, contended that the exhibition, under the circumstances, of the plaintiff's figure necessarily involved the imputation that he was concerned criminally in the death of Lieutenant Hambrough.

(1) 37 Ch. D. 170. (2) 3 Times L. R. 846.
(3) [1891] 2 Ch. 269.

Mr. Finlay, for the defendants, contended that the defendants imputed nothing disgraceful or injurious to the character of Monson, and that all that the exhibition meant was, "Here is the likeness of Monson, who was tried in the Ardlamont case, and was not convicted. Here is the likeness of a person who has recently excited much public attention in connection with a trial, the circumstances of which every one knows." Is not the inference to be drawn from what was done a proper question for the jury? Suppose a jury came to the conclusion that what was done imputed nothing disgraceful or injurious to the character of Monson, that he had become, owing to the notoriety of the Ardlamont case, a subject of public interest, and the defendants exhibited his likeness as likely to bring persons to their exhibition, adding nothing to what was known of him before, and not even associating him with the Ardlamont case, except so far as the scene of the "Ardlamont Mystery" was in the room below and the figure in the room above. Would a Court say that such a conclusion was so unreasonable that it ought not to be permitted to stand? Might not a jury without being unreasonable consider that any discredit attaching to Monson resulted from the trial, and was not affected by the exhibition of his figure at Madame Tussaud's? Might they not think, without being unreasonable, that the action was brought more in aid of his purse than his personal character? Put aside the surroundings, and what is there more in this wax figure than the publishing Monson's likeness in a newspaper, with his name under it, or the display of his likeness in a shop window? Grotesque pictures of individuals may, I doubt not, be in certain circumstances actionable if any one thought fit to notice them; but I should think it would require an uncommonly strong case to make them the subject of an interlocutory injunction. But it is said, Look at the surroundings—Mrs. Maybrick, Pigott, and Scott (another celebrity in the Ardlamont case), and the Chamber of Horrors below. No doubt all this is important, and essentially for a jury. Mr. Coleridge did not, so far as I recollect, attach much importance to the companionship, for, in answer to me, he said that if Monson's figure had been placed between Royal personages it would be the same. I am unable to agree with the decision of

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the Divisional Court, and think this case is not brought within the rule laid down in *Bonnard* v. *Perryman*. (1)

But, except for future cases that may occur, I should not have thought it necessary to express disagreement with the decision of the Court below, because there is new evidence brought before us which makes it impossible to allow the injunction to issue. As the case will have to be tried, I propose to say little about this evidence. Suffice it to say, that there is such a conflict of evidence with regard to Monson's conduct, one side saying he consented to the exhibition of his figure, and the other in a not very satisfactory way denying any consent, as to render it imperative that the facts should be investigated by a jury before any injunction is granted. It is passing strange that a man who now asserts his anxiety to bury in oblivion the circumstances of the Ardlamont case should be found writing a pamphlet on that case, and, as he says, "on the impulse of the moment," announcing himself as a public lecturer on the same subject!

Libel or no libel has, since Fox's Act, whether in civil or criminal cases, been always regarded as essentially a question for the jury. I was much impressed by an observation of Davey, L.J., during the argument, when he said that at the Chancery Bar he had always contemplated Libel with awe. I, as a member of the Common Law Bar, have always had the same feeling. Criticism is easier than composition, and speaking for myself I should deeply regret that by any subtle distinction or ingenious criticism the authority of the case of *Bonnard* v. *Perryman* (1), decided by the full Court of Appeal, should be impaired or "whittled" away, and thus some additional fetter be imposed on liberty of speech, and the functions of a jury, in my judgment, unauthorized by that decision. The appeals, therefore, must be allowed.

DAVEY, L.J. In *Coulson* v. *Coulson* (2) the Master of the Rolls is reported to have used the following words: "To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be

(1) [1891] 2 Ch. 269. (2) 3 Times L. R. 846.

exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable." I understand the Master of the Rolls to have intended the expressions that follow the words "clearest cases" as an explanation or expansion of what he meant by those words. The Master of the Rolls was so understood by Cotton, L.J., in *Liverpool Household Stores Association* v. *Smith* (1); and in *Bonnard* v. *Perryman* (2) the Lord Chief Justice, in delivering the judgment of the full Court of Appeal, approved of and adopted the language of the Master of the Rolls. I understand the Court in that case to have judicially laid down for themselves a rule of practice, which is binding upon me, with regard to the circumstances under which the Court ought to grant an interlocutory injunction pending the trial in cases of libel; or, in other words, to have defined the conditions, subject to which it is "just and convenient" to grant an injunction in such cases. In *Collard* v. *Marshall* (3) Chitty, J., granted an interlocutory injunction in a case which appeared to him to satisfy those conditions, and it is to be observed that in that case the defendant was willing to treat the motion as the trial of the action and therefore did not require the case to be submitted to a jury. I am of opinion that the principles laid down in the cases referred to are applicable to the present case; and the question, therefore, which the Court has to answer is whether the affidavits which have been read and commented on before us disclose a case on which the jury at the trial of the action could properly find only a verdict for the plaintiff. I should have much hesitation in differing from the opinion of two judges of so much experience if the case came before us only on the same affidavits as were used in the Court below. But affidavits have been used before us which raise a question of acquiescence and active consent against the plaintiff, and indeed suggest that he sold the right to exhibit his effigy with his own clothes and gun, though he afterwards changed his mind. Of course, these affidavits fall far short of proving such a case against the plaintiff, but they certainly suggest it in a manner and with circumstances which

(1) 37 Ch. D. 170. (2) [1891] 2 Ch. 269.

(3) [1892] 1 Ch. 571.

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shew that there is a case for consideration by a jury, and one on which I decline to speculate or express any opinion what their verdict ought to be when they have complete evidence by examination and cross-examination of the witnesses before them. I may observe that in *Bonnard* v. *Perryman* (1), though the libellous character of the publication was, in the language of the Lord Chief Justice, beyond dispute, the Court refused to grant an injunction on a mere suggestion by affidavit, without any particulars, of a case of justification. I ought to add that I see no logical distinction for this purpose between a case of libel affecting trade or property and one affecting character only. In basing my judgment on the ground which I have stated, I must not be taken to say whether I should or should not have agreed with the learned judges in the views expressed by them on the materials before them. Whether the exhibition of Mr. Monson's effigy under the circumstances in the place and with the surroundings mentioned in the affidavits suggests such innuendo as may be alleged in the pleadings is a question which will have to be decided by the jury on the trial of the action. This will dispose of the case against Mme. Tussaud Limited.

With regard to the case against Louis Tussaud, no case of consent has been brought before us on the affidavits in such a way as would oblige the Court to pay attention to it. But having the affidavits in the other case before us, it would be idle for the Court to pretend to shut its eyes to or ignore the fact that such a case will be open to the defendant in that action also at the trial. I think, therefore, without expressing any opinion on the merits of the case or on the opinions expressed in the Court below, it is not a case in which it is proper to grant an interlocutory injunction.

Appeals allowed.

Solicitors for plaintiff: *Brown & Co., for J. W. Phillips, Birmingham.*

Solicitors for defendants, Tussauds Limited: *E. F. & H. Landon.*

Solicitors for defendant, Louis Tussaud: *Blachford, Riches & Co.*

(1) [1891] 2 Ch. 269.

E. L.

THE VESTRY OF ST. GILES, CAMBERWELL, APPELLANTS; THE LONDON CEMETERY COMPANY, RESPONDENTS.

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Feb. 12.

Metropolis—Management Acts—Streets—New Street—Expenses of Paving—"Owners of Land"—Land set apart by Statute exclusively for Burial Purposes—Liability of Cemetery Company for Paving Expenses—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management (Amendment) Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

By the Metropolis Management Acts, 1855 and 1862 (which are to be construed together as one Act), the "owners of the land" abutting on a new street are made liable to contribute to the expenses of paving the same incurred, or to be incurred, by the vestry of the parish, and by s. 250 of the Act of 1855 "the word 'owner' shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, or who would so receive the same if such lands or premises were let at a rack-rent."

A cemetery company were, by statute, prohibited from selling or disposing of any of the consecrated land belonging to them, and such land was for ever to be set apart and used exclusively for purposes of Christian burial; but they were empowered to make profits by (amongst other things) selling or disposing of, at prices to be agreed upon, the exclusive right of burial, either in perpetuity or for a limited period, in vaults made by them, and the right to make family and other vaults, with the exclusive right of burial therein either in perpetuity or for a limited period. The company having been called upon by the vestry of the parish to contribute to the expenses of paving a new street on which consecrated land, forming part of their cemetery, abutted:—

Held, that the company were "owners" of the land within the definition of s. 250 of the Metropolis Management Act, 1855, and therefore liable to contribute to such expenses.

CASE stated by one of the metropolitan police magistrates under the Summary Jurisdiction Acts.

The respondents, the London Cemetery Company, having refused to pay, on demand, a sum duly apportioned, under the Metropolis Local Management Acts, 1855 (18 & 19 Vict. c. 120), s. 105, and 1862 (25 & 26 Vict. c. 102), s. 77, as their proportion of the estimated expense to be incurred by the appellants, the vestry of the parish of St. Giles, Camberwell, in paving a portion of a new street, appeared before the magistrate upon a summons taken out by the appellants to obtain payment of such sum.

The respondent company was incorporated under a special Act —6 & 7 Wm. 4, c. cxxxvi.—with perpetual succession and a

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common seal, and empowered to purchase, hold, and sell lands or other hereditaments for the use of the undertaking, and to make and maintain cemeteries or burial-grounds in various parishes, including the parish of Camberwell, and the parish or parishes adjoining thereto. (1)

(1) By s. 4 of 6 & 7 Wm. 4, c. cxxxvi., part of the cemeteries or burial-grounds authorized to be made by that Act shall be set apart for the interment of the dead according to the rights and usages of the Established Church, and may be consecrated for that purpose, "and when so consecrated the same shall for ever thereafter be set apart and be used and applied exclusively for the purposes of Christian burial." By s. 5 other part of such cemeteries shall be set apart for the purpose of Christian burial therein of persons not members of the Established Church, "and such portion . . . . shall be for ever set apart and appropriated and exclusively used for the interment of the dead." By ss. 6 and 7 the company are empowered to erect and build chapels for the performance of the burial service of the Established Church, and other chapels for the performance of the burial service according to the rites of churches or congregations other than the Established Church. By s. 8 the company are empowered to make and build catacombs, vaults, and other necessary buildings for burial purposes. By s. 44 they are prohibited from selling or disposing of any land "which shall have been consecrated or set apart or used for the burial of the dead." By s. 10 they may sell and dispose of, at such price or prices, sum or sums of money as they shall think proper to require, the exclusive right of burial in vaults, either in perpetuity or for a limited period, also the right of making family and other vaults, &c., with the exclusive right of burial therein, either in perpetuity or for a limited period, and the right of single interment in any of the vaults, brick graves, or graves made or constructed by the company, or in the open ground of the cemeteries, and the right of placing monuments, tablets, grave-stones, &c., as therein specified.

By 18 & 19 Vict. c. 120, s. 105: "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry . . . . of the parish . . . . in which such street is situate, be desirous of having the same paved, or if such vestry . . . . deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry . . . . shall well and sufficiently pave the same . . . . and the owners of the houses forming such street shall, on demand, pay to such vestry . . . . the amount of the estimated expenses of providing and laying such pavement," such amount to be determined by the surveyor of the vestry.

By s. 250 "the word 'owner' shall . . . . mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

By 25 & 26 Vict. c. 102, s. 77, where any vestry shall, under the

The Nunhead Cemetery, in the parish of St. Giles, Camberwell, had been acquired and was held by the respondents under the powers given by the special Act, and a portion of the land, which abutted on the new street in respect of which the expenses were claimed, had, throughout its whole length, been consecrated for the purposes of Christian burial.

At the hearing of the summons the respondents contended that they were not the "owners" of this land within the meaning of s. 250 of 18 & 19 Vict. c. 120, and therefore not liable to pay the expenses claimed. The appellants contended that the respondents were the "owners" within the meaning of that section.

The magistrate was of opinion that, having regard to the fact that the portion of the land abutting on the new street had been consecrated, and having regard to the restrictions of 6 & 7 Wm. 4, c. cxxxvi., the respondents were not the "owners" within the meaning of s. 250 of 18 & 19 Vict. c. 120, and he therefore dismissed the summons.

The question for the opinion of the Court was whether he was right in so doing.

Biron, (*Channell, Q.C.*, with him), for the appellants. The cemetery company are clearly "owners," within the meaning of the Metropolis Management Act, 1855, s. 250, of the land abutting on the new street, and as such are liable to pay their proportion of the estimated expense of paving that street to the vestry. In *Wright* v. *Ingle* (1)—on which case the learned magistrate acted in dismissing the summons—the decision of the Court of Appeal was only that a Wesleyan chapel was a house within 18 & 19 Vict. c. 120, s. 105. That decision does not touch the present case.

[He was stopped.]

Poland, Q.C. (*Broxholm*, with him), for the respondents. The

powers given by 18 & 19 Vict. c. 120, s. 105, have paved or be about to pave any new street, "the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein"; and by s. 110 this Act and (inter alia) 18 & 19 Vict. c. 120, "shall be construed together as one Act."

(1) 16 Q. B. D. 379.

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land in question, having been consecrated, has, by virtue of the special Act, been irrevocably dedicated for all time for the purposes of Christian burial. The company cannot sell or dispose of it; they can only deal with it in the limited ways provided by the special Act, which contains no power to lease it either to another body for the purposes of burial, or to individuals. Their power is limited to granting the right of interment, which is an easement and not the subject of letting. The cemetery and the chapel belonging to it are placed by statute in the same position as a parish churchyard and church are by the common law. The land is placed extra commercium; it cannot for all time be let at a rack-rent, and the company, therefore, are not the "owners" within s. 250 of 18 & 19 Vict. c. 120. In *Wright* v. *Ingle* (1), though the point here did not arise, the Court of Appeal went out of their way to state and affirm the proposition that where by statute a building or land is put in the same position as a parish church or churchyard is put by the common law—i.e., that it can never be let at a rack-rent—then the same consequences follow, that there can never be an "owner" within s. 250, and the building or land cannot be the building or land intended to be included within these Metropolis Local Management Acts. The language used by Lord Esher, M.R., completely covers this case. The fact that their special Act entitles the company to earn profits makes no difference; the vicar of a parish is entitled to receive profit for allowing persons to be buried in a particular part of the churchyard.

[He also referred to *Angell* v. *Vestry of Paddington* (2), and *Plumstead Board of Works* v. *British Land Co.* (3)]

Channell, Q.C., in reply. The cemetery company are entitled, under the powers of the special Act, to earn profits, and they are liable to be rated to the relief of the poor: *Reg.* v. *St. Mary Abbots* (4); *Reg.* v. *Abney Park Cemetery Co.* (5) There is no statutory restriction of their right to let plots of land for burial purposes by the year, and there would be no difficulty in arriving at the rent which a hypothetical tenant would give.

(1) 16 Q. B. D. 379.
(2) Law Rep. 3 Q. B. 714.
(3) Law Rep. 10 Q. B. 203.
(4) 12 A. & E. 824.
(5) Law Rep. 8 Q. B. 515.

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The observations of the Master of the Rolls in *Wright* v. *Ingle* (1), were meant to apply to cases in which there is a statutory incapacity to make profits at all. Here the company is a commercial body, owning profitable land; there is nothing to prevent them from taking an annual sum for the use of it for burial purposes; they are therefore "owners" within the definition of that word in s. 250 of the Metropolis Management Act, 1855. By s. 142 of their special Act the company's liability to make, amend, or repair roads is expressly saved, shewing a general intention of the legislature that they should not escape liability in respect of such matters as those in question in this case.

MATHEW, J. I am of opinion that our judgment should be for the appellants. I think that the cemetery company are properly chargeable with their proportion of the estimated expenses of paving the road on which their land abuts. But for the case in the Court of Appeal which has been called to our attention, I should have felt no difficulty in deciding this case. It was argued for the respondents that, the land in question having been devoted by statute to the particular purpose of the burial of the dead, the respondents did not come within the definition of "owner" in the Metropolis Management Act, 1855, s. 250, and in support of that contention certain dicta of the Master of the Rolls in *Wright* v. *Ingle* (1) were relied on. In that case, however, the sole question was whether a building used for the purposes of religious worship, but held under a lease for years by trustees on trust to permit it to be so used, was a "house" within the meaning of the statute, and whether, therefore, the owners were chargeable in respect of expenses of this description. It was there contended that the building was to be placed in the same category as a parish church because it had been devoted exclusively to purposes of worship. The Court of Appeal, however, came to the conclusion that the building was a house within the meaning of the statute, and that, notwithstanding the purposes for which it was used, the trustees were chargeable with the expenses of paving the new street upon which it abutted. The

(1) 16 Q. B. D. 379.

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case had to be distinguished from that of a church, and the Court of Appeal pointed out that the status of the trustees in respect of the building was different from that of the rector or vicar of a parish in respect of the parish church, because by agreement between the trustees, the cestuis que trustent, and the lessors, the building could at any time be applied to other uses. But there is no trace in the judgments of an intention to lay down the proposition that all land devoted to particular purposes is to be exempted from the statutory liability. The land owned by the cemetery company is partly consecrated and partly not. Except by Act of Parliament it could not be applied to any other purposes than those of interment. Does it come within the principle of the statute? It is land purchased by the company and intended to be used and applied for purposes of profit. Under the special Act the company is prohibited from selling or disposing of any land which shall have been consecrated or set apart for the burial of the dead, but they may sell and dispose of the exclusive right of burial in their vaults, either in perpetuity or for a limited period, and the right of making vaults, with the exclusive right of burial therein either in perpetuity or for a limited period. Is there anything in the Metropolis Management Act, 1855, to shew that, under this condition of things, the company are exempt from contributing to the expenses in question? [The learned judge read the definition of "owner" in s. 250.] In my opinion the company under their special Act are in a position to let for burial purposes the whole or any portion of their land at a capitalized rent or rack-rent to be paid in one sum, or at a rent from year to year. The case, therefore, comes distinctly within s. 250. I cannot see that there is any analogy between it and the case of a parish church and churchyard, as was suggested in argument. The decision in *Wright* v. *Ingle* (1) does not touch the matter we have to decide, and that portion of one of the judgments relied on which went beyond the purposes of the decision of the case does not call for any comment from us. The cemetery company are a commercial body, and their land is not in the position of a parish churchyard. I am therefore of opinion that they are "owners" of the land within the

(1) 16 Q. B. D. 379.

meaning of the statute, and liable to contribute to these expenses.

COLLINS, J. I am of the same opinion. The question for our decision is, whether the cemetery company can be compelled to contribute to paving expenses as being "owners" of land within the definition of that word in s. 250 of the Metropolis Management Act, 1855. It is contended for the company that they are not the owners because they are not "the persons for the time being receiving the rack-rent of the lands, or who would so receive the same if such lands were let at a rack-rent," and in support of that contention *Wright* v. *Ingle* (1) has been relied on. I think that that case does not go so far as was suggested. The decision was that the chapel in question there was a "house" within the meaning of s. 105; but certain observations of the Master of the Rolls are relied on which, it is said, cover this case. The cemetery company here have acquired, under the powers of their Act, the fee simple of the land; but a fetter has been placed upon their right to use the land by those sections of the Act which provide that it shall for ever be set apart and used exclusively for the purposes of Christian burial. Sect. 44 prohibits them from selling or disposing of any land consecrated or set apart or used for the burial of the dead; but by s. 10 they may sell and dispose of the exclusive right of burial in the vaults made by them either in perpetuity or for a limited period, and the right of making family or other vaults, with the exclusive right of burial therein either in perpetuity or for a limited period. Now, it is true that they are to sell those rights for such price or prices or sum or sums of money as shall be agreed upon, and it may be that a price or sum of money so received by them would not technically be a rack-rent. Some of the observations of the Master of the Rolls in *Wright* v. *Ingle* (1) would seem possibly to exclude the notion that it could be a rack-rent, because he says that the words in the definition of "owner" in s. 250 of the Act of 1855 are not "if such lands *were capable* of being let at a rack-rent," but "if such lands *were* let at a rack-rent." But when one comes to see what was the

(1) 16 Q. B. D. 379.

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Collins, J.

point he desired to establish, I do not think his language goes so far as was suggested. The point was the same as the one with which Lord Watson dealt in *Great Eastern Ry. Co.* v. *Hackney District Board of Works.* (1) Lord Watson said (at p. 693): "The authorities cited in the course of the argument appear to me to establish this proposition, that the person vested with the property of heritable subjects which have been placed 'extra commercium,' or are subject in perpetuity to the burden of a public right, which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862." That is the principle which Lord Watson derived from the authorities, and he then refers to *Angell* v. *Vestry of Paddington* (2) as establishing that principle. It seems to me that he exactly stated the true proposition. In order to be exempt the land must be extra commercium; but where the owners are entitled by statute to use it beneficially, receiving as profit a lump sum which is equivalent to a rack-rent, the land is not extra commercium. It would be too narrow a conclusion that, because the reditus is not received in the shape of a rack-rent, the land is placed extra commercium, and the owners are not owners within the meaning of the statute. There is no authority, and there are no dicta, to that effect. The only dicta which have been cited to us do not seem to me to go that length. The cemetery company are entitled by statute to sell or dispose of rights in the land, either in perpetuity or for a limited time, and that is sufficient, in my opinion, to bring their land intra commercium. But, apart from that point, I can see nothing in the local Act to prevent them from letting their land for burial purposes at a rack-rent to another company or person. I am of opinion on these grounds that the company are owners of the land within the meaning of the Metropolis Management Acts, and that our judgment should be for the appellants.

Judgment for the appellants. Leave to appeal.

Solicitors for appellants: *Marsden & Son.*
Solicitor for respondents: *A. E. Marshall.*

(1) 8 App. Cas. 687. (2) Law Rep. 3 Q. B. 714.

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1894
Feb. 12.

SWYNY *v.* HARLAND.

Solicitor—Undertaking—Enforcement—Terms of Stay of Execution—Payment of Taxed Costs—Solicitor to repay Costs if Appeal successful—Power of Court to enforce Undertaking in summary manner.

Where an order is made for a stay of execution pending appeal, the applicant to pay the taxed costs of the successful party to his solicitor on his personal undertaking to repay them should the appeal be successful, the undertaking given by the solicitor may be enforced by the Court in a summary manner.

Application by the defendant for an order on the solicitors to the plaintiff in this cause to repay to the defendant certain costs.

The action was referred to an official referee, who gave judgment for the plaintiff with costs, and refused to stay execution pending an appeal to the Divisional Court. An application to the Divisional Court for an order for a stay of execution was rejected; but on appeal to the Court of Appeal the application was granted on terms. One of the terms was that the defendant should pay to the plaintiff's solicitors the taxed costs of the proceedings before the official referee, on the solicitors giving their personal undertaking to repay the same if the appeal should be successful. The defendant accordingly paid the amount of the taxed costs to the plaintiff's solicitors, and received from them an undertaking in writing headed in the action. The undertaking was as follows: "Pursuant to the order of the Court of Appeal, dated the 2nd day of August last, we hereby personally undertake to repay the taxed costs herein should the appeal pending be successful." The appeal to the Divisional Court came on for hearing, and that Court reversed the decision of the official referee, set aside the judgment for the plaintiff, and ordered judgment to be entered for the defendant. They, however, directed a stay of execution pending an appeal to the Court of Appeal.

The defendant thereupon required the solicitors to repay the costs; but they declined to do so on the ground that the condition on which they had bound themselves to do so had not

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happened. The defendant thereupon made this application to the Court of Appeal for an order on the solicitors to repay the money pursuant to their undertaking.

Joseph Walton, Q.C., for the defendant, in support of the application. The appeal contemplated in the undertaking was that from the official referee to the Divisional Court, and that has been successful. The addition by the Divisional Court of the term that execution should be stayed does not alter the effect of the judgment for the defendant, and the money is immediately repayable.

[LORD ESHER, M.R. You are asking for an order of the Court. Is this personal undertaking made to the Court in such a way that it ought to be enforced summarily?]

An undertaking by an officer of the Court made in a cause can be enforced summarily; but the only question that either side desire to raise is as to the effect of the addition to the judgment of the Divisional Court of an order for a stay of execution.

Bigham, Q.C., for the solicitors. The solicitors do not dispute that, but for the stay of execution ordered by the Divisional Court, they are liable to repay the money; but they contend that the effect of the stay is that the result of the appeal cannot be determined until the case has been before this Court on appeal from the Divisional Court. If so, the application is premature.

LORD ESHER, M.R. I think this undertaking was given by the solicitors to the Court. They were not obliged to give the undertaking, but they elected to give the undertaking as a condition under which they were paid the costs. The only question, therefore, is, what was the undertaking? It is clear that it applied only to the application to the Divisional Court by way of appeal from the official referee. That has been successful, and the mere fact that that Court granted a stay of execution on their judgment does not make it an imperfect judgment. The event on which the solicitors were to repay the costs has happened, and therefore the obligation to repay has arisen.

LOPES, L.J. I am of the same opinion. We frequently have before us applications for a stay of execution, which we grant on terms. One term that is sometimes imposed is, that the costs shall be paid by the applicant to the solicitor on the other side, on his personal undertaking to repay them in the event of the appeal being successful. A solicitor is not bound to give such an undertaking; it is a voluntary action on his part. He is an officer of the Court, and as such voluntarily gives the undertaking, and the Court, on the faith of his doing so, makes an order. The undertaking is given in the face of the Court, and for all practical purposes the case is the same as if it were given to the Court. If so, what are the consequences if the solicitor fails to carry it out? It is open to the other party to apply either to commit or to attach him. That course has not been taken in the present case, but an application is made for an order that the money should be paid. The appeal to the Divisional Court was successful, although that Court stayed execution, and consequently the event has happened to which the undertaking applied. I think, therefore, that the defendant has a right to have the costs repaid to him at once.

DAVEY, L.J. I have no doubt whatever that where a solicitor in a cause gives an undertaking in his character of solicitor, the Court will enforce the undertaking in a summary manner. I know of no difference in this respect between other undertakings, such as one to be answerable for a debt or for damages, given by a solicitor in a cause, and an undertaking to repay costs if an appeal should be successful. The authority of the Court to enforce such an order is stated in Archbold's Practice (13th ed. p. 103) and *Re Hilliard* (1), a case of an undertaking to pay the debt in consequence of which the plaintiff stayed proceedings, is cited in support of that view. Hall, V.C., in *Re Woodfin & Wray* (2), enforced an undertaking not made directly to the Court, but contained in a letter directed to the solicitors on the other side.

As, however, the solicitors are perfectly willing to repay the money if the Court should be of opinion that the stay of

(1) 2 D. & L. 919. (2) 51 L. J. (Ch.) 427.

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execution does not defer the right of the defendant to claim repayment, the Court will make no order except as to the costs of this motion, to which the applicant is entitled.

No order except as to costs.

Solicitors for applicant: *Downing, Holman & Co., for Sampson, Williamson, & Inglis, Liverpool.*

Solicitors for solicitors: *Day, Russell & Co.*

A. M.

1893 *Dec.* 16.

[CROWN CASE RESERVED.]

THE QUEEN *v.* TYRRELL.

Criminal Law—Offences against the Person—Carnal Knowledge of Girl between Thirteen and Sixteen—Aiding and Abetting Misdemeanor—Inciting to Commit Offence—Criminal Law Amendment Act, 1885 (48 & 49 *Vict.* c. 69), s. 5.

It is not a criminal offence for a girl between the ages of thirteen and sixteen to aid and abet a male person in committing, or to incite him to commit, the misdemeanor of having unlawful carnal knowledge of her contrary to s. 5 of the Criminal Law Amendment Act, 1885.

CASE reserved by Mr. Commissioner Kerr.

The defendant, Jane Tyrrell, was on September 15, 1893, tried and convicted at the Central Criminal Court on an indictment charging her, in the first count, with having unlawfully aided and abetted, counselled, and procured the commission by one Thomas Ford of the misdemeanor of having unlawful carnal knowledge of her whilst she was between the ages of thirteen and sixteen, against the form of the statute, &c.; and, in the second count, with having falsely, wickedly, and unlawfully solicited and incited Thomas Ford to commit the same offence.

It was proved at the trial that the defendant did aid, abet, solicit, and incite Thomas Ford to commit the misdemeanor made punishable by s. 5 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69).

The question for the opinion of the Court was, "Whether it is an offence for a girl between the ages of thirteen and sixteen to

aid and abet a male person in the commission of the misdemeanor of having unlawful carnal connection with her, or to solicit and incite a male person to commit that misdemeanor."

W. Clarke Hall, (*William Campbell*, with him), for the defendant. At common law a person cannot be convicted of a misdemeanor committed upon himself, except the offence of maiming himself so as to render him unfit for military service: Co. Litt. 127a; 1 Hawkins P. C. 7th ed. 626. It follows that he cannot be convicted of aiding and abetting such a misdemeanor. Under the statute 24 & 25 Vict. c. 100, s. 58, a woman is not indictable for administering poison or other noxious thing to herself with intent to procure abortion, unless she is with child when she does so; but she is liable to conviction and punishment if, with the same intent, she administers poison, &c., to another woman, though the other be not with child. In *Reg.* v. *Whitchurch* (1) a woman, believing herself to be with child, but not being with child, conspired with others to administer drugs to herself with intent to procure abortion, and she was held liable to be convicted of the conspiracy. That case, therefore, has no application here. It is impossible that the legislature, in passing the Criminal Law Amendment Act, 1885, can have intended that the women and girls for whose protection it was passed should be liable to prosecution and punishment under it. Part I., in which s. 5 comes, is headed "Protection of Women and Girls." A girl under sixteen is treated as of so immature a mind as not to be capable of consenting. The Act assumes that she has no mens rea, and she cannot, therefore, be treated as capable of aiding and abetting. If a girl is liable to be convicted of aiding and abetting an offence under s. 5 she is also liable to conviction for aiding and abetting the felony made punishable by s. 4, and she would then be liable to be sentenced to penal servitude for life, because an accessory before the fact to a felony may be punished as a principal. The result would be to render the Act inoperative, because girls would not come forward to give evidence. The Criminal Law Amendment Act, 1885, s. 5, created no new offence, and for 600 years it has never

(1) 24 Q. B. D. 420.

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been suggested that such an offence as that charged against the defendant could be committed at common law. As to the count for soliciting and inciting the commission of the offence under s. 5, the same reasons apply against it; and, further, the offence of "incitement" is only committed where the felony or misdemeanor suggested has not been committed. If it has been committed, the person counselling or procuring it is an accessory before the fact in the case of felony, and a principal in the case of misdemeanor: 2 Stephen's History of the Criminal Law, p. 230.

Hutton, for the Crown, contended that the defendant could properly be convicted upon both counts of the indictment, but that, at any rate, she could on the second count, because the offence under s. 5 was a misdemeanor, and the defendant, having incited Ford to commit it, had herself been guilty of a misdemeanor.

LORD COLERIDGE, C.J. The Criminal Law Amendment Act, 1885, was passed for the purpose of protecting women and girls against themselves. At the time it was passed there was a discussion as to what point should be fixed as the age of consent. That discussion ended in a compromise, and the age of consent was fixed at sixteen. With the object of protecting women and girls against themselves the Act of Parliament has made illicit connection with a girl under that age unlawful; if a man wishes to have such illicit connection he must wait until the girl is sixteen, otherwise he breaks the law; but it is impossible to say that the Act, which is absolutely silent about aiding or abetting, or soliciting or inciting, can have intended that the girls for whose protection it was passed should be punishable under it for the offences committed upon themselves. I am of opinion that this conviction ought to be quashed.

MATHEW, J. I am of the same opinion. I do not see how it would be possible to obtain convictions under the statute if the contention for the Crown were adopted, because nearly every section which deals with offences in respect of women and girls would create an offence in the woman or girl. Such a result cannot have been intended by the legislature. There is no

trace in the statute of any intention to treat the woman or girl as criminal.

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GRANTHAM, LAWRANCE, and COLLINS, JJ., concurred.

Conviction quashed.

Solicitors for defendant: *Crawshaw & Co.*

Solicitor for the Crown: *Moreton Phillips.*

W. A.

[IN THE COURT OF APPEAL.]

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1894

Jan. 30, 31; *Feb.* 1, 27.

GOUGH *v.* WOOD & CO.

Mortgage—Trade Fixtures—Hire and Purchase Agreement—Rights of Mortgagee against Owner of the Fixtures.

By agreement between the defendants and E., who was tenant for a term of years of a piece of land, the defendants agreed to supply him with a boiler for the purpose of his trade, to be paid for by instalments and to remain the property of the defendants till all the instalments were paid; and it was further agreed that in case of default of payment of any of the instalments, the defendants might enter and carry away the boiler. E. then mortgaged his interest in the land by underlease to the plaintiff, who had no notice of the agreement, and who allowed E. to remain in possession. The defendants afterwards supplied the boiler, which was fixed in the land. One of the instalments not being paid, the defendants entered and carried the boiler away. In an action by the plaintiff against the defendants for removing the boiler:—

Held (affirming the decision of Wright, J.), that the plaintiff, having allowed the mortgagor to remain in possession, must be taken to have acquiesced in his making agreements for fixing and removing fixtures for the purposes of his trade, and that he could not claim the boiler as against the defendants.

Sanders v. *Davis* (15 Q. B. D. 218) and *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* ([1892] 1 Ch. 415) followed.

APPEAL from a judgment of Wright, J.

W. Edmonds was a nurseryman carrying on business on a piece of land at Enfield, Middlesex, which he held as tenant under a lease for ninety-nine years from H. Moon. By an agreement dated November 1, 1889, between the defendants, who were hot-water engineers, of the first part, Edmonds of the second part, and Moon of the third part, the defendants agreed to let on hire to Edmonds for the term of one year, an iron boiler, therein described, and 553 yards of piping with fittings, for the sum of 96*l.* 19*s.*, to be erected on the premises of Edmonds. The sum of 96*l.* 19*s.*

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was to be paid by quarterly instalments as therein mentioned, the first instalment to be paid on March 25, 1890. And it was agreed that the boiler, pipes, and fittings should be hired by Edmonds for a year, and until payment of the whole of the said instalments they should remain the exclusive property of the defendants, and, in case of default of payment of any instalment, or in case of the bankruptcy of Edmonds, the defendants should be entitled to resume possession of the said boiler, pipes, and fittings. And Edmonds thereby granted permission to the defendants to enter on the premises at all reasonable times to inspect the boiler, pipes, and fittings, and, in case of breach of any of the clauses of the agreement, to resume possession of and to remove the same. And H. Moon joined in the agreement to give power to the defendants to enter on the premises and remove the boiler, pipes, and fittings according to the terms of the agreement. And it was agreed that upon payment of the whole of the instalments the boiler, pipes, and fittings should become the property of Edmonds. The agreement was not under seal.

By an indenture dated November 12, 1889, Edmonds mortgaged his leasehold interest in the land by underlease to the plaintiff for securing 100*l.* and interest. At the date of the mortgage the plaintiff had no notice of the agreement between Edmonds and the defendants. The plaintiff allowed Edmonds to remain in possession of the premises.

The defendants commenced to deliver the apparatus in the early part of December, and the whole was delivered before the end of January, 1890. The boiler was fixed in the brickwork of a hot-house under the direction of Edmonds, and the pipes were cemented into the wall. Edmonds remained in possession of the land and paid some of the instalments; but he afterwards made default in payment, and, on August 25, 1892, before the whole of the purchase-money was paid, he was adjudicated bankrupt.

On October 14, 1892, the defendants entered on the land and unfixed and removed the boiler and pipes. On December 6, 1892, the official receiver gave notice that he should disclaim the lease of the premises.

On the same day the plaintiff commenced the present action

against the defendants for damages for the removal of the boiler and pipes, which he claimed as included in his mortgage.

The action was tried before Wright, J., on November 9, 1893, who gave judgment for the defendants, and the plaintiff appealed.

Bosanquet, Q.C., and *Tindal Atkinson*, for the plaintiff. The law is well established that whatever is fixed to the land loses its character as a chattel and becomes part of the freehold: according to the old maxim, "Quicquid plantatur solo, solo cedit." Whatever contract there may have been between the mortgagor and the defendants who supplied the boiler, it makes no difference to the mortgagee. No private contract could alter the character which the law imposes on the fixtures: Bacon's Abr. Trespass, E. 2. The rule as to trade fixtures only applies as between landlord and tenant. There are numerous cases where it has been held that a mortgagor cannot remove fixtures as against his mortgagee; and the defendants cannot have a better right than the mortgagor with whom they made the contract: *Ex parte Cotton* (1); *Cullwick* v. *Swindell* (2); *Mather* v. *Fraser* (3); *Climie* v. *Wood* (4); *Longbottom* v. *Berry* (5); *Holland* v. *Hodgson* (6); *Elwes* v. *Brigg Gas Co.* (7) The fact that the mortgagor was a leaseholder and not the owner of the fee is immaterial: *Ex parte Barclay* (8); *Meux* v. *Jacobs* (9); *Moody* v. *Steggles* (10).

Swinfen Eady, Q.C., and *Ernest Pollock*, for the defendants. The rule as to chattels becoming part of the land into which they are fixed is not an absolute rule. The case of tenants' fixtures is an exception, and there may be many others. It must depend upon the intention of the parties, and the object for which the chattels were fixed; no one would contend that the scaffold poles fixed by a builder for the purpose of his work belonged to the freeholder: *Wood* v. *Hewett* (11); *Lawton* v.

(1) 2 M. D. & De G. 725.
(2) Law Rep. 3 Eq. 249.
(3) 2 K. & J. 536.
(4) Law Rep. 4 Ex. 328.
(5) Law Rep. 5 Q. B. 123.
(6) Law Rep. 7 C. P. 328.
(7) 33 Ch. D. 562.
(8) 5 D. M. & G. 403.
(9) Law Rep. 7 H. L. 481, 493.
(10) 12 Ch. D. 261.
(11) 8 Q. B. 913.

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Lawton (1); *Lancaster* v. *Eve* (2); *Wake* v. *Hall* (3); *Fisher* v. *Dixon* (4); *Parson* v. *Hind* (5); Amos and Ferard on Fixtures, ed. 1883, p. 302. In the present case the agreement under which the boiler was fixed, and the circumstances under which it was made, must be taken into consideration. The mortgagee had allowed the mortgagor to remain in possession, and he must be taken to have acquiesced in the fixing of the boiler. The case is similar to *Sanders* v. *Davis* (6), where it was held that a tenant of a mortgagor might remove trade fixtures put up by himself. *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (7) is on all-fours with the present case, and the Court cannot decide against the defendants without overruling that decision.

Bosanquet, Q.C., in reply.

Cur. adv. vult.

LINDLEY, L.J. This is an action for damages for the removal of fixtures from land mortgaged to the plaintiff. The facts are simple. One Edmonds held some land on lease from a person named Moon. Edmonds was a nurseryman, and he carried on business on the land in question. He wanted heating apparatus for his hot-houses, and he applied to the defendants, Wood & Co., to supply it. They agreed to do so on the hire and purchase system; and by an agreement dated November 1, 1889, made between Wood & Co., Edmonds, and Moon, Wood & Co. agreed to put up some heating apparatus—viz., a boiler and 553 yards of hot-water pipes—for Edmonds for 96*l.* 19*s.*, payable by quarterly instalments. It was agreed that this hot-water apparatus should be hired by Edmonds for a year; and that until payment of the last instalment the apparatus should remain the exclusive property of Wood & Co., and that in default of payment they should be at liberty to enter and remove the apparatus. The agreement further stated that Moon, the landlord, joined in the agreement for the express purpose of giving Wood & Co. power to enter and remove the apparatus pursuant to the agreement, and Moon agreed not to distrain upon the apparatus

(1) 3 Atk. 13.
(2) 5 C. B. (N.S.) 717.
(3) 8 App. Cas. 195.
(4) 12 Cl. & F. 312.
(5) 14 W. R. 860.
(6) 15 Q. B. D. 218.
(7) [1892] 1 Ch. 415.

to the detriment of Wood & Co. Upon payment of the whole of the instalments the apparatus was to become the property of Edmonds. This agreement was not under seal, and did not therefore amount to a grant of land or of an easement, to which any subsequent mortgage would be subject. On November 12, 1889, Edmonds mortgaged his land to the plaintiff. He had no notice of the agreement. Shortly afterwards, whilst Edmonds was in possession, Wood & Co., the defendants, who had no notice of the mortgage, put up the hot-water apparatus. This was fixed in the usual way. The boiler was set in brickwork, and the pipes were cemented into a wall through which they passed. The apparatus was so fixed as to be irremoveable without injuring the brickwork; but, on the other hand, it was not fixed more than was necessary for use as a heating apparatus, and it is obvious that its removal was contemplated in two contingencies—viz., first, by the defendants if they were not paid; and, secondly, by Edmonds as a trade fixture when it had become his. After this the plaintiff made Edmonds a further advance, but whether with or without notice that the apparatus had been put up does not appear. Edmonds made default in paying the instalments, and the defendants thereupon entered and removed the heating apparatus. This was done whilst Edmonds was still in possession. The plaintiff afterwards brought this action against Wood & Co. for wrongfully removing part of the property mortgaged to him. The action was heard before Wright, J., who gave judgment for the defendants, and the plaintiff has appealed from his decision.

The plaintiff's claim, put shortly, is that, not being party to the agreement of November 1, and not having notice of it, he is not bound by it, either at law or in equity, and that the heating apparatus having been affixed to his property without his consent the apparatus ceased to be a chattel and became part of the soil and irremoveable as against him. The plaintiff does not deny that the apparatus was a trade fixture removeable as between landlord and tenant during the tenancy, even apart from any special agreement to that effect; but he relies on cases which shew that trade fixtures put up by a mortgagor cannot be removed by him as against his mortgagee, and contends

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that Wood & Co. are in no better position than Edmonds himself would have been. The plaintiff's counsel also relied on *Ex parte Cotton* (1) and *Cullwick* v. *Swindell* (2), in which trade fixtures of a firm on land belonging to one of the partners were held to pass by a mortgage of that land executed before the fixtures were put up. The cases of *Mather* v. *Fraser* (3); *Climie* v. *Wood* (4); *Longbottom* v. *Berry* (5); *Holland* v. *Hodgson* (6), shew beyond all doubt that if the apparatus in question had been the property of the mortgagor and he had fixed it, although only for the purposes of his trade, it would not have been removeable by him as against his own mortgagee. The fact that the mortgage is by a lessee and not by an owner in fee is immaterial: *Southport and West Lancashire Ry. Co.* v. *Thompson* (7); *Meux* v. *Jacobs* (8), where the mortgage was equitable. Further, the partnership cases mentioned above shew that fixtures put up by a firm on the separate property of one of the partners pass to his mortgagee. His co-partners could not recover them from him, and he, of course, could not claim them from his mortgagee. Whether on taking the partnership accounts he would or would not have to account for their value would in no way concern the mortgagee. None of those decisions, however, cover the present case. We have to consider, not the right of a mortgagor to remove property of his own which he has fixed, but the right of a third person to unfix and carry away a chattel of his own which he has fixed at the request of a mortgagor in possession and for the purpose of enabling him to carry on his trade—a chattel, moreover, which has been fixed upon the terms that its owner may remove it if not paid for, and which, not being paid for, has been removed before the mortgagee has taken possession. The case undoubtedly presents difficulties which ought not to be passed over unnoticed. Wright, J., went, I think, too far in holding "that one man's property cannot be taken away from him by being fixed in the land of another." Cases can be put in which this might happen;

(1) 2 M. D. & De G. 725.
(2) Law Rep. 3 Eq. 249.
(3) 2 K. & J. 536.
(4) Law Rep. 4 Ex. 328.
(5) Law Rep. 5 Q. B. 123.
(6) Law Rep. 7 C. P. 328.
(7) 37 Ch. D. 64.
(8) Law Rep. 7 H. L. 481.

and the law stated in Brooke's Abr. Property, 23, and reproduced (although with a wrong reference) in Bac. Abr. Trespass, E. 2, is, I take it, good law even now. It is there said: "If a piece of timber which was illegally taken from J. S. have been hewed, this action (viz., trespass) does not lie against J. S. for retaking it. But if a piece of timber which was illegally taken have been used in building or repairing, this, although it is known to be the piece which was taken, cannot be retaken, the nature of the timber being changed; for by annexing it to the freehold it is become real property." If I employ a builder to build me a house and he does so with bricks which are not his, I apprehend that they become mine and that their former owner cannot recover them or their value from me. The old law expressed in the maxim, "Quicquid plantatur solo, solo cedit," although much relaxed since the days of the year-books, has not yet been replaced by the rule which prevents the owner of real property from granting a better title than he himself has; nor has the maxim in question yet given way to the ordinary rules which are applicable to sale of chattels whilst still unfixed to land. It is not, however, necessary in this case to attempt to reconcile any conflicting principles of law; when it becomes necessary to do so attention will have to be paid to the judgments in the important cases of *Holland* v. *Hodgson* (1) and *Wake* v. *Hall*. (2) The present case is, in my opinion, governed by two decisions relating to trade fixtures put up by mortgagors in possession. The first is *Sanders* v. *Davis* (3), in which it was held that a tenant of a mortgagor in possession might remove trade fixtures put up by himself, and that those fixtures did not belong to the mortgagee. The mortgage was prior to the lease, and the lessee was not the mortgagee's tenant; so that the ordinary doctrine relating to trade fixtures, which only applies as between landlord and tenant (see *Fisher* v. *Dixon* (4)), was not strictly applicable to the case. The fact that the person who put up the fixtures was tenant to the mortgagor and had a right to remove them as against him was held sufficient to prevent the fixtures becoming the property of the mortgagee. The next

(1) Law Rep. 7 C. P. 328.
(2) 8 App. Cas. 195.
(3) 15 Q. B. D. 218.
(4) 12 Cl. & F. 312.

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case is *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (1), which was similar to the present in all material respects. In that case North, J., decided against the mortgagees on the ground that, having regard to the position of the parties, the mortgagees could have no better title to the fixtures than their mortgagor. We were asked to overrule this case; but, in my opinion, it was rightly decided, having regard to the fact that the mortgagor was in possession, which is the case here also. This circumstance affords an answer to the argument based on the fact that the defendants fixed their apparatus to the plaintiff's land without his consent. By leaving the mortgagor in possession the mortgagee impliedly authorized him to carry on his business and to sell and remove the plants, trees, and shrubs which, though fixed to the soil, constituted his stock-in-trade. This implied authority can hardly be confined to such things, but may fairly be regarded, and I think ought to be regarded, as authorizing the mortgagor whilst in possession to hire and bring and fix other fixtures necessary for his business, and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired. Unless this be so, persons dealing bonâ fide with mortgagors in possession will be exposed to very unreasonable risks; and honest business with them will be seriously impeded. This implied authority and the fact that the hot-water apparatus was not the property of the mortgagor are the important features of this case, and are, in my opinion, sufficient to protect the defendants from the claim of the plaintiff. Whether Wood & Co. could have removed the apparatus if it had been put up before the mortgage to the plaintiff, or if the plaintiff had taken possession before removal, are questions which it is unnecessary to decide, and on which I express no opinion. In such a case as the present the mortgagee's security is neither better nor worse than when he took it, and no injury is inflicted on him. The appeal must be dismissed with costs.

KAY, L.J. The plaintiff claims damages against the defendants for the removal of a boiler and pipes from certain greenhouses on the grounds of a nurseryman of which the plaintiff is

(1) [1892] 1 Ch. 415.

mortgagee. Mr. Edmonds, the nurseryman and mortgagor, held the premises on a long lease. The boiler and pipes were the subject of a hiring and sale agreement made November 1, 1889, by which the defendants agreed with Edmonds that the boiler and pipes should become his property on the payment of the price by certain instalments, but that until complete payment they were to remain the property of the defendants. Edmond's lessor was a party to this agreement. The mortgage was made after this agreement, viz., on November 12, 1889. The mortgagee knew nothing of this agreement. The mortgagor was left in possession, and the boiler and pipes were fixed upon the premises after the date of the mortgage. Default was made by Edmonds in payment of the instalments, and the defendants, on October 14, 1892, while the mortgagor was still in possession, removed the boiler and pipes as by the agreement of November 1, 1889, they were empowered to do.

No question arises between the mortgagor and his landlord, who, as I have said, was a party to the hire and purchase agreement. The boiler and pipes were fixed in brickwork in the usual way, and were certainly fixtures in the sense that they became part of the land and ceased to be mere personal chattels. If bricks or timber belonging to A. be wrongfully taken by B., and built by him into a house belonging to C., A. cannot recover them against C., though their identity is clear: Bac. Abr. Trespass, E. 2, and the reason given is that the nature of the material is changed, and it has become real property. Even a tenant who has a right as against his landlord to remove trade fixtures during the term cannot maintain trover for them while annexed to a part of the realty: *Lee* v. *Risdon* (1); *Davis* v. *Jones* (2); *Colegrave* v. *Dias Santos* (3); *Minshall* v. *Lloyd.* (4) There is no doubt that a mortgagee is entitled to all fixtures as against his mortgagor, whether put upon the land before or after the mortgage: *Walmsley* v. *Milne* (5); *Ackroyd* v. *Mitchell* (6); *Meux* v. *Jacobs* (7); *Cullwick* v. *Swindell* (8); *Climie* v. *Wood.* (9)

(1) 7 Taunt. 188.
(2) 2 B. & A. 165.
(3) 2 B. & C. 76.
(4) 2 M. & W. 450.
(5) 7 C. B. (N.S.) 115.
(6) 3 L. T. (N.S.) 236.
(7) Law Rep. 7 H. L. 481.
(8) Law Rep. 3 Eq. 249.
(9) Law Rep. 4 Ex. 328.

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This is so whether the mortgage is of a freehold or of a leasehold property: *Ex parte Barclay.* (1) Therefore, the mortgagor could not have removed these fixtures without the consent of the mortgagee, and, of course, he could not authorize any one else to do so. Where articles are affixed to the land so that they are no longer personal chattels, no one can take them from a mortgagee without his consent, unless he had a conveyance of them by deed or an agreement for value binding upon the mortgagee. Where the mortgagee has taken possession there is an additional difficulty, because then no one could enter to remove the fixtures without committing a trespass. If fixtures could be removed under an agreement like this against a subsequent purchaser or mortgagee without his consent, he would be subject to a danger which at present has never been understood to exist. Besides the chance of infirmity of the mortgagor's title to the land there would be the risk that the fixtures upon it might, by a contract between the mortgagor and a third person, remain the property of such third person and be removeable by him. I should be sorry to see this additional danger imposed upon a bonâ fide purchaser or mortgagee. A case may easily be supposed where such a law might deprive him of a large part of the value of the property, as, for example, the machinery in a mill or large manufactory.

The question, therefore, is whether the mortgagee has assented to the removal of the fixtures. He had not taken possession at the time when the fixtures were removed. The mortgagor was a nurseryman carrying on his business upon the land mortgaged. He was left in possession by the mortgagee, and during such possession it must be inferred that the mortgagee assented to the mortgagor doing everything that was usual and proper to enable him to trade as a nurseryman. For example, until prevented by the mortgagee taking possession, he might remove and sell the young trees that he was cultivating for that purpose, though they, while growing, were a part of the land. If then, while in such position, he obtained the boiler and pipes upon an agreement which allowed the vendor to remove them if default was made in paying for them, why should not the

(1) 5 D. M. & G. 403.

mortgagee be taken to have assented to the vendor being allowed to remove them, just as a purchaser of trees might do with the consent of the mortgagor in possession? Suppose that after the mortgagee had taken possession the boiler and pipes had been fixed under the previous agreement with the mortgagor, the mortgagee, if he allowed them to be fixed, could not ignore the agreement under which they were so fixed. Ought he to be in a better position if they were fixed and removed under that agreement before possession was taken by him? As the boiler and pipes were removed while the mortgagor was in possession and was carrying on, with the assent of the mortgagee, a business for the purposes of which they were fixed, I think his licence may be held to extend so far as to permit the removal while that business was being carried on by the mortgagor, and before the mortgagee put an end to it by taking possession.

Turning to the authorities, it has been decided that if a mortgagor in possession enters into partnership with other persons, and the firm put fixtures on the mortgaged premises, they cannot be removed against the mortgagee: *Ex parte Cotton* (1); *Cullwick* v. *Swindell* (2); *Climie* v. *Wood.* (3) In *Sanders* v. *Davis* (4), a mortgagor while in possession let to a tenant named Hunt, who put certain tenant's fixtures upon the demised premises. The mortgagee then sold the property, including the tenant's fixtures, and the tenant's assign of the fixtures was held entitled to recover the value of the fixtures from the mortgagee. Manisty, J., who was one of the judges in that case, says that the mortgagee allowed the mortgagor to remain in possession and deal with the property. If the mortgagee had taken possession and let, and his tenant had brought trade fixtures on to the premises, he would have been entitled to remove them when the tenancy terminated, and he continued: "I cannot see why a mortgagee should be in a better position in this respect when he permits the mortgagor to deal with the property and let in a tenant. I think he must be taken to have known of the letting to Hunt and to have acquiesced in it, and consequently he would not have been able to prevent Hunt from removing the fixtures."

(1) 2 M. D. & De G. 725.
(2) Law Rep. 3 Eq. 249.
(3) Law Rep. 4 Ex. 328.
(4) 15 Q. B. D. 218.

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That is, that there was an implied assent by the mortgagee to the terms on which the fixtures were placed which bound him to allow their removal. In *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (1), the facts were practically the same as in the present case. Mortgagors in possession of a colliery which they had mortgaged put up certain machinery under a hire and purchase agreement. The mortgagees obtained the appointment of a receiver, and on his giving up the property it was held that the machinery might be removed by the vendor of it. The learned judge, North, J., says in his judgment: "I think it was not in the power of the mortgagors to confer on their mortgagees a better title than they themselves had to the property which they agreed to mortgage to them." But he based his decision on the fact that the receiver was going to abandon the colliery. I do not understand the language of the learned judge in that case to mean that the fixtures could be removed without the consent of the mortgagees. The decision may be supported upon the ground of an implied assent by them. If it means that the fixtures could be removed without such implied assent, I should respectfully differ from that view. As the mortgagee has not taken possession in this case before the removal of the fixtures, I think that it is right to imply his assent to the fixing and removal of the boiler and pipes, and that on this ground the decision may be affirmed.

A. L. SMITH, L.J. I have had the advantage of reading Lindley, L.J.'s, judgment. I entirely agree with it, and have nothing to add.

Appeal dismissed.

Solicitors for plaintiff: *Robins, Billing & Co.*
Solicitors for defendants: *Torr & Co.*

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M. W.

[IN THE COURT OF APPEAL.]

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1894
March 8.

IN RE SCHOOL BOARD ELECTION FOR THE PARISH OF PULBOROUGH.

BOURKE AND OTHERS, PETITIONERS; NUTT, RESPONDENT.

Bankruptcy—Disqualifications of Bankrupt—Bankruptcy before Act creating Disqualification—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), s. 32.

By the 32nd section of the Bankruptcy Act, 1883, "Where a debtor is adjudged bankrupt," he shall be subject to certain disqualifications therein specified.

Held (by Lopes and Davey, L.JJ., Lord Esher, M.R., dissenting, reversing the decision of the Queen's Bench Division), that the section has not a retrospective operation, and therefore the disqualifications created by it do not attach to a person made a bankrupt before the passing of the Act.

SPECIAL CASE stated under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 93, sub-s. 7.

1. At the school board election for the borough of Pulborough, which took place on April 19, 1893, the respondent was a candidate for election, and was declared to be elected a member of the school board.

2. The respondent was at the time of such election, save as may appear upon the facts in the next paragraph mentioned, qualified to be elected a member of the school board.

3. Proceedings in bankruptcy under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), were commenced against the respondent on February 23, 1883, and he was adjudged bankrupt under that Act on March 19, 1883, and has not obtained his discharge, nor has the adjudication been annulled.

4. An election petition was duly presented by the petitioners, under the Municipal Corporations Act, 1882, and the Bankruptcy Act, 1883, on May 9, 1893, to the High Court of Justice in the Queen's Bench Division, alleging that the respondent was at the time of the election disqualified on the ground that he was an undischarged bankrupt, and praying that it might be determined that the respondent was not duly elected, and that his election was void.

The question for the opinion of the Court was, whether the

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respondent was at the time of the election disqualified for being elected a member of the school board.

1893. Nov. 21. *G. J. Talbot*, for the petitioners. The respondent was disqualified, by s. 32 of the Bankruptcy Act, 1883 (1), from being elected a member of the school board. That section has a retrospective operation, and applies to the case of a person adjudged bankrupt before the Act came into force, the words "where a debtor is adjudged bankrupt" being merely descriptive of the debtor's present status and condition whenever produced. The rule against treating an Act as retrospective applies only to statutes imposing penal consequences on the voluntary doing of certain acts, and does not apply where a particular state of things was brought about involuntarily, so far as the person affected was concerned, before the passing of the Act.

[He cited *Ex parte Pratt, In re Pratt* (2); *Reg.* v. *Vine* (3); *Reg.* v. *St. Mary, Whitechapel* (4); *Reg.* v. *Inhabitants of Christ-*

(1) 46 & 47 Vict. c. 52, s. 32, sub-s. 1: "Where a debtor is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for (inter alia):—

"(*e*) Being elected to . . . the office of . . . member of a school board."

Sub-s. 2: "The disqualifications to which a bankrupt is subject under this section shall be removed and cease if and when:—

"(*a*) The adjudication of bankruptcy against him is annulled; or

"(*b*) he obtains from the Court his discharge, with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part."

Sect. 169 repeals the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71); and by sub-s. 2: "The repeal effected by this Act shall not affect

"(*a*) anything done or suffered before the commencement of this Act under any enactment repealed by this Act; nor

"(*b*) any right or privilege acquired, or duty imposed, or liability or disqualification incurred, under any enactment so repealed; nor

"(*c*) any fine, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed or to be committed against any enactment so repealed."

Sub-s. 3: "Notwithstanding the repeal effected by this Act, the proceedings under any bankruptcy petition, liquidation by arrangement, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act, shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue, and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto, as if this Act had not passed."

(2) 12 Q. B. D. 334.

(3) Law Rep. 10 Q. B. 195.

(4) 12 Q. B. 120.

church (1); *Edmonds* v. *Lawley* (2); *Cornill* v. *Hudson* (3); *Pardo* v. *Bingham* (4); *Ex parte Salaman, In re Salaman.* (5)]

S. H. Day, for the respondent. Sect. 32 ought not to be construed retrospectively. The grammatical meaning of the words "where a debtor is adjudged bankrupt" points to a prospective operation only. At any rate the words are ambiguous, and should be construed in favour of the persons affected by the enactment, which imposed consequences upon a bankrupt in the nature of penalties. The same words used in s. 23 must have a prospective operation only, because that section deals with the power of the creditors by special resolution to accept a composition or scheme of arrangement after the adjudication, and in s. 20 the words "where a receiving order is made against a debtor" can only operate prospectively because the section can only apply to receiving orders under the Act of 1883. The effect of s. 169, sub-s. 3, is to continue, in bankruptcies pending when the Act of 1883 was passed, the procedure under the Act of 1869, and no such disqualifications were attached to bankruptcy under the Act of 1869 as are imposed by s. 32 of the Act of 1883. If the disqualifications of s. 32 applied to bankruptcies pending when the Act of 1883 was passed, s. 2 of the Bankruptcy (Discharge and Closure) Act, 1887 (50 & 51 Vict. c. 66), which provides for the discharge of bankrupts in bankruptcies pending under the Act of 1869, was unnecessary, because s. 32, sub-s. 2, of the Act of 1883 itself provides for the debtor obtaining his discharge from the Court as a means of removing his disqualification. *Ex parte Pratt, In re Pratt* (6), *Reg.* v. *Vine* (7), and *Ex parte Salaman, In re Salaman* (5) do not apply to the present case. [He referred to *Ex parte Raison, In re Raison.* (8)]

G. J. Talbot, replied.

LAWRANCE, J. The question we have to decide in this case arises under s. 32 of the Bankruptcy Act, 1883. The case we

(1) 12 Q. B. 149.
(2) 6 M. & W. 285.
(3) 8 E. & B. 429.
(4) Law Rep. 4 Ch. 735.
(5) 14 Q. B. D. 936.
(6) 12 Q. B. D. 334.
(7) Law Rep. 10 Q. B. 195.
(8) 60 L. J. (Q.B.) 206; 63 L. T. (N.S.) 709.

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Lawrance, J.

have to deal with is that of a person who became bankrupt prior to the passing of that Act, and has been elected a member of a school board since that Act was passed, and the question is whether the disqualification in respect of bankruptcy contained in s. 32 applies to him or not. I cannot say that I am entirely free from doubt upon the matter; but upon the whole I have arrived at the conclusion that the words of s. 32 have a retrospective operation. I think that the words "where a person is adjudged bankrupt" do not mean "adjudged after the passing of this Act," but mean "a person who has been adjudged a bankrupt at the time this Act was passed, or who becomes a bankrupt after it has been passed." Our attention was called during the argument to s. 169, which repeals the Bankruptcy Act, 1869. I think that sub-s. 2, which provides that the repeal effected by this Act shall not affect (*b*) "any right or privilege acquired, or duty imposed, or liability or disqualification incurred," under any enactment so repealed, means that where any disqualification under the Act of 1869 exists it shall not be affected by the provisions of the Act of 1883, and sub-s. (*c*), to my mind, makes that abundantly clear, because it goes on to deal with "any fine, forfeiture, or other punishment incurred, or to be incurred, in respect of any offence committed or to be committed, against any enactment so repealed." In my opinion s. 169 has not the effect which the respondent's counsel contended for. Our attention was called to the case of *Ex parte Pratt, In re Pratt* (1), in which no doubt the Court had to deal with a different matter, namely, whether bankruptcy proceedings could be carried on under the Act of 1883 where those proceedings were founded upon an act of bankruptcy committed prior to the commencement of that Act. Now, without stopping to consider the facts of that case, I will simply observe that the language used by the Lords Justices—especially by Bowen, L.J.—seems to be extremely wide and perfectly capable of including a case such as the one we are dealing with. But the case which, I am bound to say, most strongly affects my mind is that of *Reg.* v. *Vine.* (2) The Act in question there was the Wine and Beer Amendment Act, 1870,

(1) 12 Q. B. D. 334. (2) Law Rep. 10 Q. B. 195.

and the words—different, no doubt, from those we have to deal with in the present case—were, "every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no license shall be granted to any person who shall have been so convicted; and if any person, after having been so convicted, shall take out or have a licence, the same shall be void to all intents and purposes." The question was whether those words applied to a person convicted before the Act was passed, or whether their application was restricted to cases in which persons were convicted of felony after the passing of the Act. It was held that the words of the section applied to persons convicted both before and after the Act was passed. To my mind, that case was a much stronger one than this. A person who might have been convicted many years before the Act was passed, and might for years since his conviction have held a licence, had this disqualification sprung upon him—so to speak—when the Act was passed, and from that time forward became for ever incapable of holding a licence. The reasons for their judgment given by the majority of the Court seem to me to apply with equal force in the present case.

Under s. 32, certain things may be done to relieve from the disqualification of bankruptcy the person to whom it applies. He is relieved if and when the adjudication of bankruptcy against him is annulled; or if he obtains from the Court his discharge, with a certificate that his bankruptcy was caused by misfortune without any misconduct on his part. There are other disqualifications imposed by s. 32 besides that in respect of being elected a member of the school board; and, to my mind, the relieving clause applies only to the disqualifications imposed by the section, and has nothing to do with the ordinary proceedings with respect to discharge and closure in a bankruptcy under the Act of 1869. Those are dealt with by the Bankruptcy (Discharge and Closure) Act, 1887. I think that those two matters—namely, proceedings to obtain discharge and closure in bankruptcies under the Act of 1869, and proceedings to obtain relief from the disqualifications imposed by s. 32 of the Act of 1883—are intended to be kept entirely distinct. For these reasons I am of opinion that the respondent was

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disqualified from being elected a member of the school board, and that the question asked in the special case ought to be answered in the affirmative.

WRIGHT, J. I am of the same opinion. I think there are two governing considerations which ought to decide this case. First, the intention of the legislature in enacting s. 32 of the Act of 1883 was to prevent certain public offices being filled by persons who were undischarged bankrupts. It was not thought fit that such persons should fill those offices, and there is no good reason for cutting down or limiting the application of that principle by making the section apply only to persons adjudged bankrupt after the Act came into force. Those who were adjudicated bankrupt before that date had no particular right to different treatment from those who were adjudicated bankrupt afterwards. Although I agree that the disqualifications defined in s. 32 were created for the first time by the Act of 1883, and that far wider and graver consequences of disqualification are thereby attached to persons who had become bankrupt before the Act came into force than attached to their bankruptcy at the time they were adjudicated bankrupt, still that is nothing more in principle than was held by the Court of Queen's Bench, in *Reg.* v. *Vine* (1), to be proper in the case of a conviction for felony. There, where a man committed felony before the Act was passed, it did not subject him to disqualification for holding a licence for the sale of liquors; but it was nevertheless held that the legislature intended that such disqualification should be added as an additional consequence of his crime. It was pressed upon us that the grammatical construction of s. 32 compelled us to hold that its effect was not intended to be retrospective. I think that *Ex parte Pratt, In re Pratt* (2), is an authority which answers that contention.

The second consideration is this: the language of the Bankruptcy Disqualification Act, 1871 (34 & 35 Vict. c. 50), s. 2, is, "every peer who becomes a bankrupt shall be disqualified from sitting or voting in the House of Lords, or in any committee thereof"; and by s. 9, "this Act shall apply to any person who

(1) Law Rep. 10 Q. B. 195. (2) 12 Q. B. D. 334.

before or after the passing of this Act becomes bankrupt, and subsequently succeeds to a peerage, whose bankruptcy has not determined at the time of his so succeeding; also, to any person who has become bankrupt before the passing of the Act, and whose bankruptcy has not determined at such time, in the same manner as if his bankruptcy had occurred immediately after the passing of this Act." Now the Bankruptcy Disqualification Act, 1871, is repealed by the Act of 1883; but the disqualification is re-enacted in s. 32; so that in the very section which contains the disqualification re-enacted by this s. 32, a retrospective disqualification is attached to bankruptcy, and attached to it without any qualification whatever. Sect. 32 was enacted to extend the law as to the disqualification of bankrupts, and it is inconceivable that Parliament, having before it a statute which retrospectively disqualified peers for bankruptcy, should, in extending the law as to disqualification, have cut away the retrospective operation of the existing disqualification, and left those peers who had become bankrupt between 1871 and 1883 wholly free from any disqualification.

On both grounds, therefore, I concur with my learned brother in thinking that the petitioners are entitled to our judgment.

Judgment for the petitioners. Leave to appeal.

W. A.

The respondent appealed.

Feb. 21. *Dickens, Q.C.*, and *S. H. Day*, for the respondent. The question is whether a person adjudicated bankrupt under the Bankruptcy Act, 1869, is disqualified for election to the school board under the Bankruptcy Act, 1883, s. 32. By s. 169 bankruptcies pending under the Act of 1869 are to be worked out under that Act. In the earlier Act there was no provision for disqualification for school boards, which at that time did not exist. The disqualification contained in the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), Sched. II., 1st part (14), is altogether different. It provides that, when a member of the school board is adjudged bankrupt his office shall be vacated, but he is to be eligible for re-election: *Reg.* v. *Turmine.* (1)

(1) 4 Q. B. D. 79.

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The scope of the provisions of the Bankruptcy Act, 1883, with regard to bankruptcies pending at the time of the passing of the Act, is to treat them as if the Act had not been passed. To construe s. 32 as contended for by the petitioners is to give it a retrospective construction so as to interfere with vested rights, for before the Act the respondent would have had a right to be a candidate for election, and the electors would have had a right to elect him. The extraordinary result would follow from that construction, that under s. 32, sub-s. 2, the disqualification of a person becoming bankrupt under the Act of 1883 might be removed if he obtained a certificate under clause (*b*) that his bankruptcy was caused by misfortune, without any misconduct on his part, whereas the disqualification of a person becoming bankrupt under the Act of 1869 could not be so removed, because by s. 169, sub-s. 3, of the Act of 1883 it is expressly provided that with regard to pending bankruptcies the proceedings shall go on as if the Act had not passed. So that a person adjudged bankrupt under the Act of 1869 would be in a worse position than a person adjudged bankrupt under the Act of 1883. [They cited *Ex parte Pratt, In re Pratt* (1); *Ex parte Raison, In re Raison.* (2)]

Channell, Q.C., and *G. J. Talbot*, for the petitioners. The first question is what was the mischief intended to be guarded against by s. 32, and, having regard to that, whether the provision, if construed as disqualifying the respondent, would be retrospective within the meaning of the rule which prevents the retrospective action of penal statutes. An enactment is not necessarily retrospective because some of the conditions under which it is applicable may have existed before it came into force. The meaning of s. 32 is that if at any future time a man is in the position described—that is, is a bankrupt—he is to be subject to certain disqualifications. This is not the case of a penal enactment, for the object of the section is not to inflict a penalty on the bankrupt, but in the public interest to provide with regard to certain offices for the eligibility of the persons to fill them. If a statute said that deaf people should not be eligible for an office, it could not be contended that it only

(1) 12 Q. B. D. 334. (2) 60 L. J. (Q.B.) 206; 63 L. T. (N.S.) 709.

applied to people who became deaf after the Act. There cannot be said to be a vested right either in a person to be a candidate for an office, or in others to elect a particular person to an office within the meaning of the doctrine against retrospectiveness. [They cited *Reg.* v. *Vine* (1), *Reg.* v. *St. Mary, Whitechapel* (2), and *Pardo* v. *Bingham.* (3)]

S. H. Day, in reply, referred to *In re Lord Colin Campbell.* (4)

Cur. adv. vult.

1894. March 8. Lord Esher, M.R. In this case the respondent has been elected and has acted as a member of the Pulborough School Board. A petition has been presented, urging that he was disqualified from being elected and acting, and the Divisional Court has so held. The circumstances are these. The respondent was adjudicated a bankrupt before the passing of the Bankruptcy Act, 1883. He was at the time of the passing of that Act and is now an undischarged bankrupt. It is said that s. 32 of that Act does not apply to him; that to make it apply would be to make it retrospective; that the disqualification contained in that section is penal; and that consequently the section ought not to be construed as retrospective if that course can be avoided. In my opinion, s. 32 is not penal within the meaning of the proposition, which states that a penal statute must be construed strictly, and in my opinion it is not, in the true sense of the term, retrospective. The language of the section is, "where a debtor is adjudged bankrupt he shall be disqualified for," among other things, "being elected to or holding or exercising the office of member of a school board." The section does not say where a person "has been," or where a person "shall be" adjudged bankrupt, either of which forms of expression would make the intention clear; but the expression used is between the two.

In the first place, I should say that the section is not penal within the meaning which must be put on that expression for the purpose of determining whether a statute can be treated as retrospective. I cannot think that the legislature intended these

(1) Law Rep. 10 Q. B. 195.
(2) 12 Q. B. 120.
(3) Law Rep. 4 Ch. 735.
(4) 20 Q. B. D. 816.

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Lord Esher, M.R.

disqualifications as punishments, for by the same section it appears that the disqualifications are to be removed if the debtor obtains a certificate to the effect that his bankruptcy was caused by misfortune, without any misconduct on his part. To my mind, to say that the legislature intended to punish a debtor of whom that can be said would be to charge the legislature with injustice. The disqualifications are intended solely for the protection of the public, and not by way of punishment. The case of *Reg.* v. *Vine* (1) is a strong authority to shew that under such circumstances that which is enacted is not penal. That, to my mind, is the effect of the judgment of Cockburn, C.J.; but the matter is clearly stated by Mellor, J., who says: "It appears to me to be the general object of this statute that there should be restraints as to the persons who should be qualified to hold licences, not as a punishment, but for the public good, upon the ground of character." The question there was whether a person who had committed a felony became disqualified on the passing of the Act from holding a licence. The case was a more severe one than the present; but the principle was adopted that if a statute creates disqualifications for the public good and not as a punishment to the person disqualified, it should not be treated as penal so as to exclude its being construed retrospectively. The same principle is clearly laid down in *Ex parte Pratt, In re Pratt* (2), a decision arising under this statute, though not on the sections we have been considering. The case arose under s. 4 of the statute, which provides that "a debtor commits an act of bankruptcy" in each of the cases specified, while in s. 5 the words are, "if a debtor commits an act of bankruptcy." So that in this very statute there are enactments in the present tense, and Cotton, L.J., pointed out that the language used was applicable to the state of things existing at the time when the petition is presented. Bowen, L.J., in the same case, said of the Act: "I think it is framed on the idea that a bankruptcy code is being constructed, and when the present tense is used, it is used, not in relation to time, but as the present tense of logic." That is, as I understand, that the time to be looked at is not that at which the act of bankruptcy was committed, whether before or

(1) Law Rep. 10 Q. B. 195. (2) 12 Q. B. D. 334.

after the passing of the Act, but the time at which it has to be determined whether an act of bankruptcy has been committed. The judgment of Fry, L.J., is to the same effect, and the case seems to me to shew that when the present tense is used in this statute the time to be considered is the time at which the Court has to act, and not the time at which the condition of things on which it has to act came into existence.

Applying this principle to the present case, the important time is that at which it has to be considered whether the person is disqualified from being elected to or exercising any office. If that is the true construction of the Act it is not retrospective, but prospective, for it relates to a time after the passing of the Act. Therefore, on the authority of this Court, and on the ordinary rules of construction, it seems to me that we cannot say this section is retrospective; and even if it could be said that it is retrospective, its enactments are solely for the public benefit, and the rule that restricts the operation of a penal retrospective statute does not apply, because this statute is not penal.

Speaking for myself, I should say that the result of holding otherwise would create a manifest injustice. A man who was adjudicated a bankrupt before the Act of 1883, under such circumstances that his discharge was postponed indefinitely on account of misconduct, might, according to the construction which has been put, wrongly I think, on rule 12 of the Elementary Education Act, 1870, be re-elected by the electors, and would be no longer disqualified. Such a conclusion seems to me to be very extraordinary; but at present we are not asked to overrule the case that so decided. Then there might be another man, sitting beside the former, who had committed an act of bankruptcy since 1883 and was in the position of an undischarged bankrupt, but under such circumstances that, when the bankruptcy proceedings are inquired into he will get his certificate on the ground that his bankruptcy was caused by misfortune, without any misconduct on his part. This man must retire while the other remains, and the case is the more serious since the fraudulent undischarged bankrupt may be the petitioner to oust the other. I cannot bring myself to say that we ought so to construe the statute as to bring about such a result.

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I agree with the decision to which the Divisional Court came, and think the appeal should be dismissed.

The following judgment was read by

LOPES, L.J. The facts, so far as material, are as follows: On March 19, 1883, the respondent had been adjudged a bankrupt under the Bankruptcy Act, 1869. At a school board election, which took place on April 19, 1893, the respondent was a candidate for election, and was declared to be duly elected. At the time of his said election he had not obtained his discharge, nor had his bankruptcy been annulled. He was an undischarged bankrupt.

On May 9, 1893, a petition was presented to the High Court alleging that the respondent at the time of his election was disqualified on the ground that he was an undischarged bankrupt. The question is whether, in these circumstances, the respondent, under s. 32 of the Bankruptcy Act, 1883, is disqualified for being elected a member of the school board.

The answer to this question depends upon whether s. 32 is retrospective in its operation, or prospective only, and s. 32 says that where "a debtor is adjudged bankrupt" he shall, subject to the provisions of the Act, be disqualified for almost every kind of office and appointment, these being specified, and amongst them for "being elected a member of a school board."

It has been contended that the words "is adjudged bankrupt" are to be read, "has been adjudged bankrupt either before or after the passing of this Act."

I cannot so read those words. Independently of other considerations, with which I will presently deal, and regarding them only from a grammatical standpoint, I should read them, "is adjudged bankrupt under this Act." The sentence would then be, where a debtor "is adjudged bankrupt under this Act he shall, subject to the provisions of this Act, be disqualified." This reading seems more consonant with sense than "where a debtor has been adjudged bankrupt under this Act, or any previous Act, he shall, subject to the provisions of this Act, be disqualified." The former reading gives to "is" its ordinary and natural meaning; the latter distorts it.

The Bankruptcy Act, 1883, was an Act to amend and consolidate the law of bankruptcy, and created disqualifications and disabilities which had not before attached to bankruptcy.

It is a well-recognised principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended.

This principle of construction is especially applicable when the enactment to which a retrospective effect is sought to be given would prejudicially affect vested rights or the legal character of past transactions. It need not be penal in the sense of punishment.

Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect.

In *Midland Ry. Co.* v. *Pye* (1), Erle, C.J., says: "Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain and unambiguous language; because it manifestly shocks one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law; and wherever it is possible to put upon an Act of Parliament a construction not retrospective, the Courts will always adopt that construction."

The position of the respondent previously to the Bankruptcy Act, 1883, under the School Board Act (33 & 34 Vict. c. 75) was, that on his being adjudged a bankrupt under the Bankruptcy Act, 1869, his seat on the board would be vacated, but he would be re-eligible for election at any succeeding triennial election of members of the board: *Reg.* v. *Turmine.* (2) This case was not sought to be impugned at the bar.

Under s. 32 of the Bankruptcy Act, 1883, the respondent on being adjudged a bankrupt is disqualified from being elected a

(1) 10 C. B. (N.S.) 179, at p. 191. (2) 4 Q. B. D. 79.

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member of the school board until the adjudication of bankruptcy against him is annulled, or he obtains from the Court his discharge, with a certificate to the effect that his bankruptcy was caused by misfortune, without any misconduct on his part. A new disability, therefore, is imposed upon him, and disabilities are imposed on other persons which had no existence before the Bankruptcy Act of 1883. Having regard to the scope of the Act, and the rule of construction applicable to statutes, I am confirmed in my view as to the true reading of the words in s. 32 "is adjudged bankrupt."

It was urged that the words "where a debtor is adjudged bankrupt" are equivalent to the words "where a debtor is an adjudicated bankrupt"; but if the legislature so meant, why did they not use that form? And this observation is the more cogent, because in the preceding section—viz., s. 31—the expression "undischarged bankrupt" is used.

Again, s. 169 is most material, and points in the same direction. It provides that any proceedings under the Bankruptcy Act, 1869, are to continue, and all its provisions are to apply thereto as if the Act of 1883 had not passed. The appellant's bankruptcy is a pending proceeding, for he has not obtained his discharge, and he would have to apply for his discharge under the Bankruptcy Act of 1869.

The legislature, in my opinion, intended that bankruptcies under the Act of 1869 were to be subject to the incidents of a bankruptcy under that Act, and were not to be affected by the Act of 1883.

The repeal of the Bankruptcy Act of 1869 is not to affect "anything done or suffered before the commencement of this Act under any enactment repealed by this Act" (Bankruptcy Act, 1883, s. 169, sub-s. 2 (*a.*)). This would appear to retain the old disqualification, which, as I have observed, was different and less severe than that imposed by s. 32. In ss. 33 and 34 the same words, "is adjudged bankrupt," are used, and it cannot be contended that to those words as used in those sections a retrospective operation can be attached.

It seems to me highly improbable that the legislature, when passing a new Bankruptcy Act creating great changes in the

law, and attaching wider and graver disabilities to bankruptcy, would impose new and penal consequences on bankruptcies already existing.

Wright, J., in his judgment seems to have relied on the language of the Bankruptcy Disqualification Act, 1871, which is repealed by the Act of 1883, but re-enacted in this s. 32. The words are, "Every peer who becomes a bankrupt shall be disqualified"; and s. 9 says that the Act shall apply to "Any person who before or after the passing of this Act becomes bankrupt, and subsequently succeeds to a peerage, whose bankruptcy has not determined at the time of his so succeeding, . . . or any person who has become bankrupt before the time of the passing of this Act and whose bankruptcy has not determined." The learned judge thinks it inconceivable that the legislature could have intended a different construction to be placed on the s. 32 without expressly saying so. In my opinion, the omission in the Act of 1883 of any interpretation clause or any words giving a retrospective effect to the disability is most significant, and is strong evidence to prove that no retrospective effect was intended.

The Court below were also much influenced in their judgment by the case of *Reg.* v. *Vine.* (1) It is always dangerous to interpret one Act of Parliament by another, and the more especially is this the case where the words used and the subject-matter dealt with are different.

The words under consideration in that case were, "Every person convicted of felony." It is difficult to distinguish those words from the words in question; but there was nothing in the Act of Parliament which had then to be construed to qualify or interpret their effect as there is in this case. Nothing, I mean, like s. 169, indicating that the incidents of an old bankruptcy under the Act of 1869 were to continue, or like ss. 33 and 34, where similar words are used in circumstances where a retrospective effect cannot be attributed to them. Apart, however, from these points of difference, I do not hesitate to say I prefer the reasoning of Lush, J., who differed from the other members of the Court.

(1) Law Rep. 10 Q. B. 195.

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Lopes, L.J.

I cannot accept that case as governing the case now before us. *Ex parte Pratt* (1), which was cited, is also distinguishable. The construction adopted did not impose any new liability or disability; it only gave effect to that which would have happened if the Act of 1883 had not been passed, viz., cases in which an act of bankruptcy had been committed under the Act of 1869; but no proceedings had been taken under that Act. It was a convenient construction to adopt, and does not militate with the view I take of s. 32 of the Bankruptcy Act, 1883, or the principles I apply to its construction. I think, therefore, that the decision of the Court below should be reversed.

DAVEY, L.J., read the following judgment. I am of opinion that the appeal in this case ought to succeed. It was not contended on the part of the petitioners that any disability or disqualification was imposed on the respondent by the Elementary Education Act, 1870, or that *Reg.* v. *Turmine* (2) was wrongly decided. The question therefore seems to me to turn on the proper construction to be put on the words "Where a man is adjudged bankrupt" at the commencement of s. 32 of the Bankruptcy Act, 1883. Now, reading those words alone, and apart from considerations arising out of the subject-matter of the section in which they occur, I should certainly understand them (according to the ordinary use of the English language) to mean, if any man shall or may hereafter be adjudged bankrupt; and unless there be some controlling context in the Act or in the section, I hold that to be the meaning of the words. It has been suggested that the words may be read as meaning "where a man is an adjudicated bankrupt." The answer seems to me to be that those are not the words before us, and that the words we have to construe are grammatically different. I think the words "is adjudged" are the verb, whereas in the paraphrase suggested the word "adjudicated" would be an adjective. The one form of sentence points to an event to happen, whereas the form suggested predicates a certain quality of the subject which may just as well attach to him by a previous adjudication as by a subsequent one. Now, is there any context to be found in the Act itself which should

(1) 12 Q. B. D. 334. (2) 4 Q. B. D. 79.

control what I hold to be the primâ facie meaning of the words? I think not. By s. 169 all existing disqualifications are preserved, and, although I do not think that the eligibility to a school board was a privilege or right preserved by that section, I think the language of the section shews an intention to leave existing bankrupts as they were, and negatives any necessity for implying any new disqualification. If I turn to ss. 33 and 34 in the same group of sections where the same words are used, I find that they are necessarily prospective only, and they afford me no assistance in construing the words in s. 32 otherwise than in their ordinary grammatical sense. Does the subject-matter of the section supply any reason for so doing? In my opinion, the argument is the other way. This Act is not a School Board Act, but a Bankruptcy Act for the primary purpose of defining the liabilities and consequences of bankruptcy, and although the section in question is no doubt dictated by regard to the public interest, it does impose disabilities and consequences of a serious character on persons adjudged bankrupt, and is in that sense and to that extent a penal enactment. It is a well-known principle in the construction of statutes, that where the words admit of two constructions you are not to construe them so as to produce a retrospective effect, or impose disabilities not existing at the passing of the Act. If I thought this language more ambiguous than I confess I do, I think this principle should be applied, and the words, being at best ambiguous, ought not to be construed so as to impose upon then existing bankrupts disabilities which they were not at that time under. If the legislature had meant such a result, it would have been exceedingly easy, instead of using this ambiguous form of words, to say so—as was in fact done in the Act of 1871 referred to by Wright, J.

With regard to the cases which have been referred to, in *Reg.* v. *Vine* (1) the words construed were grammatically and substantially different: "Every person convicted of felony." The observations I have made on the suggested paraphrase in the present case apply to the words in that case. In *Ex parte Pratt* (2) the Court had to construe other sections of the Bankruptcy

(1) Law Rep. 10 Q. B. 195. (2) 12 Q. B. D. 334.

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Act expressed in different language and with a different context, and there were very strong reasons of policy and convenience for adopting the construction placed on the Act by the Court. I do not think it is any authority in the present case.

For these reasons I agree with the Lord Justice that the judgment of the Court below should be reversed.

Appeal allowed.

Solicitors for petitioner: *Parish & Hickson, for R. A. Blagden, Littlehampton.*

Solicitors for respondent: *Palmer & Bull, for Mant & Mant, Storrington.*

A. M.

1894 *Jan.* 12.

[IN THE COURT OF APPEAL.]

IN RE HELSBY. EX PARTE THE TRUSTEE.

Bankruptcy—Appeal—Time for Appealing—"Perfecting" of Order—Bankruptcy Rules, 1886, *rr.* 109, 130.

By the Bankruptcy Rules, 1886, r. 109, "Every order for payment of money and costs, or either of them, shall be sealed, and be signed by a registrar, and shall be forthwith filed with the proceedings." By rule 130, no appeal to the Court of Appeal from any order of the Court is to be brought after the expiration of twenty-one days. "The said period shall be calculated from the time at which the order is signed, entered, or otherwise perfected". . . .:—

Held, that an order is "perfected" within r. 130 when it is signed by the registrar, and that the time for appealing against it runs from the date of the signature.

It is not necessary to "perfect" an order that it should be filed with the proceedings to which it relates.

APPEAL by the trustee in the bankruptcy of Mary Ann Helsby, a married woman, and by the official receiver, against an order of a Divisional Court (Vaughan Williams and Kennedy, JJ.), by which an order of the judge of the county court at Blackburn was reversed, and a receiving order and an adjudication of bankruptcy, which had been made in the county court against Mrs. Helsby, were respectively set aside.

Leave was given to appeal to the Court of Appeal.

The order of the Divisional Court was pronounced on November 20, 1893. On December 1, the registrar signed two engross-

ments of the order (as settled by him on November 30), and they were then sealed with the seal of the Court. One of these engrossments was delivered out to the solicitors of Mrs. Helsby, and the other was retained by the officer of the Court for the purpose of its being placed on the file of proceedings in the matter.

The engrossment thus retained was filed by the officer of the Court on December 2, as appeared by an entry in a diary kept by him. The order as engrossed contained a direction that the deposit of 20*l.*, made by the applicant on lodging the appeal to the Divisional Court, should be returned to the applicant or her solicitors. The date of the registrar's signature did not in any way appear in the order.

Notice of the appeal from the order of the Divisional Court was served on Mrs. Helsby's solicitors on December 23, 1893. On January 4, 1894, they gave notice to the appellants that on the hearing of the appeal they intended to raise the preliminary objection that the appeal had not been entered and served within the twenty-one days allowed by rule 130 of the Bankruptcy Rules, 1886.

A clerk of Messrs. Jaques & Co., the appellants' London agents, deposed that, "On December 6, Duckworth & Mathews (the appellants' solicitors at Bradford) inquired of Jaques & Co. as to the time within which notice of appeal from the order of the Divisional Court would have to be given, and I thereupon attended at the Bankruptcy Court, and saw the clerk of appeal to the Divisional Court, to ascertain the date of the perfecting of the order of the Divisional Court. After referring to his book, he informed me that the last day for lodging the notice of appeal would be December 23, as the order of the Divisional Court had been entered or completed on December 2 last. Thereupon Jaques & Co. informed Duckworth & Mathews accordingly."

It also appeared that the deponent saw the entry in the diary of the clerk of appeal, which stated that the order had been filed on December 2.

Herbert Reed, Q.C., and *Waugh*, for the appellants.

Muir Mackenzie, for the debtor, took the preliminary objection,

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that the notice of the appeal had been served too late. The order was perfected on December 1, when it was signed by the registrar, and the twenty-one days limited by rule 130 (1) of the Bankruptcy Rules, 1886, for appealing ran from December 1, and expired on December 22. The notice of appeal was not served till December 23, and that was too late. The filing of the order with the proceedings was not necessary to make it a perfect order. It became a perfect order when it was signed by the registrar. If it had been an order for the payment of money execution could then have been issued upon it.

Herbert Reed, Q.C., and *Waugh*, for the appellants. The order was not perfected till it was filed. "Filing" corresponds to "entry" in the Chancery Division. At any rate, there are "special circumstances" which afford a ground for extending the time for appealing. The order did not shew upon its face, as is the usual practice, the date of its signature by the registrar, and the appellants' solicitor was misled by seeing in the diary of the officer of the Court December 2 as the date of filing. He had a right to assume that the order would be filed immediately after it had been signed, and therefore that it had been signed on December 2: *Ex parte Luxon.* (2)

[LORD HALSBURY. In that case the mistake was made by the officer of the Court, not by the appellant.]

This order is within rule 109, which requires filing "forthwith" after signing.

LORD HALSBURY. No doubt, as a general rule, if there is a real question to be argued, it is better that it should be argued than that the appeal should be disposed of upon a technical objection. But the legislature have fixed twenty-one days as the

(1) Rule 130: "Subject to the powers of the Court of Appeal to extend the time under special circumstances, no appeal to the Court of Appeal from any order of the Court, shall be brought after the expiration of twenty-one days. The said period shall be calculated from the time at which the order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal."

By rule 109, "Every order for payment of money and costs, or either of them, shall be sealed, and be signed by a registrar, and shall be forthwith filed with the proceedings."

(2) 20 Ch. D. 701.

time within which an appeal in a bankruptcy matter must be brought; and the question is, from what date that time begins to run. I cannot feel any doubt that the time runs from the date when a perfect and operative order is made. In the present case, I think that the order became perfect and operative on December 1. The words of rule 130 were probably intended to include by their generality a number of different procedures in different Courts—that is, that when an order becomes a perfect order by signature, the time for appealing is to run from the date of the signature; that when an order becomes perfect by entry, the time is to run from the date of entry; and that, in whatever other way an order becomes perfect, the time is to run from the date of its being perfected. In the present case, the order was sealed with the seal of the Court, signed by the registrar, and delivered out to the party on December 1; and in my opinion it then became an operative order, and the time for appealing ran from that date.

The rule gives the Court power, "under special circumstances," to extend the time for appealing. Here there are, in my opinion, no special circumstances. A mistake was made by the clerk of the appellants' solicitors. If that is a "special circumstance," then in every case in which a blunder has been made about the time for appealing, the time ought to be extended. I do not think that is the meaning of the rule. The notice of appeal was served too late, and I can see no ground for extending the time. The appeal must be dismissed.

LOPES, L.J. I entirely adopt the view of my Lord as to the meaning of the rule—viz., that the words were intended to apply to different procedures by which a perfect order is obtained in different Courts. In the present case, I think the order became perfect on December 1, and the time for appealing ran from that date, and expired on December 22. In my opinion, there are no "special circumstances" which can justify an extension of the time. The only ground put forward is a mistake as to the meaning of the rule.

DAVEY, L.J. I agree that the appeal is out of time. It is to be observed that rule 130 is a repetition of rule 15 of Order LVIII.

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Davey, L.J.

of the Rules of the Supreme Court. In my opinion, the words ought to be read disjunctively—that is, as meaning that when an order is perfected by signing the time runs from the date of signing; when, as in the Chancery Division, an order is perfected by entry, the time runs from the date of entry; and when an order is perfected in any other way, the time runs from the date of its being made perfect. I cannot doubt that, in the present case, the order was perfected on December 1, when it was sealed with the seal of the Court, and certified by the signature of the registrar. It was a perfect order when it was handed out to the party on that day. The rule which requires that an order shall be filed is, in my opinion, only directory, and is intended only for the purpose of securing a proper record of the proceedings. The filing is not necessary to the "perfecting" of the order. Upon the question whether the time ought to be extended, speaking for myself, I am inclined to adopt the view of the late James, L.J., that a party has a vested right in an order of the Court in his favour, and ought not to be deprived of an advantage given to him by the rules, "unless there has been on his part some conduct raising an equity against him," or in a case of "inevitable accident." I cannot see that a mistake made by the solicitor of the party who is applying for an extension of the time is a sufficient ground for extending it.

Appeal dismissed.

Solicitors: *Jaques & Co., for Duckworth & Mathers, Bradford; Pritchard, Englefield & Co., for Southman & Harwood, Manchester.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.
1894
March 6, 8, 16.

IN RE THOMAS. JAQUESS *v.* THOMAS.

Solicitor—Champerty and Maintenance—Bill of Costs—Taxation—Retainer of, and payment of Money to, Solicitor for an illegal Purpose—Right of Client to Taxation of Bill of Costs and Account of Money Paid.

Money was subscribed by strangers for the maintenance of litigation for the recovery of property, to be repaid out of the property if recovered. This money was intrusted to J., who, by the authority of the claimant, retained a solicitor to conduct the litigation on behalf of the claimant, and paid him large sums of money out of the funds subscribed. The litigation was unsuccessful. J. then took out a summons against the solicitor for delivery and taxation of his bill of costs and an account of the money paid to him:—

Held, affirming the decision of the Divisional Court (Mathew and Collins, JJ.), that the solicitor could not resist the taxation or the account on the ground that the employment for which he was retained, and for which the money was paid, was illegal.

APPEAL from a decision of a Divisional Court (Mathew and Collins, JJ.) affirming an order of the master that Howell Thomas, formerly a solicitor, should deliver to Colonel Jaquess his bill of costs and an account of moneys paid to him. The circumstances were shortly as follows. A person named W. Lawrance, who lived in America, claimed to be entitled to property of large value called the Townley Estates, situate in this country. Lawrance was a man of no means and was unable to incur the expense of prosecuting his claim, and several persons in America subscribed large sums of money, amounting altogether to about 11,000*l.*, to enable him to maintain the necessary litigation, upon the terms that if it was successful they should be repaid out of the property recovered. The arrangement was to be carried out by means of bonds executed by Lawrance, which were to be made charges on the estate. The fund thus subscribed was intrusted to Colonel Jaquess, who came to England, and, acting under a power of attorney from Lawrance, instructed Howell Thomas to act as solicitor in the litigation on behalf of Lawrance. On June 9, 1886, an action, *Lawrance* v. *Lord Norreys*, was commenced in the Queen's

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IN RE THOMAS. JAQUESS v. THOMAS.

Bench Division, which was dismissed; and afterwards an action in the Chancery Division between the same parties (1), which was eventually dismissed as frivolous and vexatious by the House of Lords. (2) In all three proceedings Thomas acted as solicitor for the plaintiff; but he subsequently ceased to practise as a solicitor. Colonel Jaquess alleged that he had paid large sums of money to Thomas out of the fund which had been subscribed in America, and he took out a summons calling upon him to deliver his bill of costs, and an account of the moneys received by him. The master granted the application, and the Divisional Court affirmed his decision. Thomas now appealed to the Court of Appeal. His grounds of appeal were, first, that the relation of solicitor and client never existed between himself and Colonel Jaquess; secondly, that if such relation did exist there was a special agreement between them which precluded the delivery of a bill of costs and taxation; thirdly, that all accounts between them had been settled, except as to a sum of 4000*l.*, which Thomas alleged that he did not receive as a solicitor; and, fourthly, that the work which Thomas was employed to do was illegal on the ground of maintenance and champerty, and that no assistance ought therefore to be given by the Court to either party as against the other.

Murphy, Q.C., *Willis, Q.C.*, and *Danckwerts*, for the appellant. As to the first three points, they relied on the evidence that had been adduced. On the fourth point they cited *Kearley* v. *Thomson* (3); *Bone* v. *Eckless* (4); *Taylor* v. *Chester* (5); *Taylor* v. *Bowers* (6); *Taylor* v. *Lendey* (7); *Hampden* v. *Walsh* (8); *Holman* v. *Johnson* (9); *Scott* v. *Brown.* (10)

Rolland, for the respondent.

Willis, Q.C., in reply.

Cur. adv. vult.

(1) 39 Ch. D. 213.
(2) 15 App. Cas. 210.
(3) 24 Q. B. D. 742.
(4) 5 H. & N. 925.
(5) Law Rep. 4 Q. B. 309.
(6) 1 Q. B. D. 291.
(7) 9 East, 49.
(8) 1 Q. B. D. 189.
(9) Cowp. 341 at p. 343.
(10) [1892] 2 Q. B. 724.

1894. March 16. The judgment of the Court (Lindley, Kay, and A. L. Smith, L.JJ.) was delivered by

Lindley, L.J. [After considering the facts of the case, the Lord Justice stated the opinion of the Court on the first three points to be—that the relation of solicitor and client did exist between Thomas and Colonel Jaquess; that the agreements and letters which were in evidence left Thomas's costs to be dealt with according to the ordinary rules applicable to solicitor and client; that there was no settled account which could preclude the taxation of the bill of costs, and that the sum of 4000*l.* was paid to Thomas as a solicitor, and must be brought into his account in the usual way. The Lord Justice then proceeded as follows:—]

We come now to the last point—viz., the illegality of Thomas's retainer on the ground of maintenance and champerty. It was certainly startling to hear counsel of eminence contend that a solicitor and officer of the High Court could set up such a defence against a client invoking the jurisdiction of this Court to compel such solicitor to deliver a bill of costs and cash account for work done and money received by him in his character of such solicitor. Is every rascally solicitor to invoke his own rascality as a ground of immunity from the jurisdiction of the Court? Or is the Court to listen to a solicitor who, after acting for and advising his client and taking his money, is mean enough to denounce him and set up the illegality of the client's conduct as a reason why the Court should not call its own officer to account? Or is the Court judicially to hold that, although it may strike such a solicitor off the rolls, it cannot legally compel him to do that which every man with a spark of honour would do without hesitation—viz., account to the client who has employed him? We emphatically protest against any such notion. The Court expects and exacts a high standard of honour on the part of solicitors to their clients, and ought not to listen, and will not listen, to such a scandalous defence as that set up by Thomas in this case. We do not blame counsel for arguing such a point. They did their duty in raising it, and in deference to them we have considered it; but, having done so, we dismiss it as wholly untenable. The doctrine laid

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down by Lord Mansfield in *Holman* v. *Johnson* (1), and recently acted upon by this Court in *Scott* v. *Brown* (2), has never been applied, and, in our opinion, ought not to be applied, to the exercise of the jurisdiction of the Court over its own officers. We may, however, add that there is no proof that either Jaquess or Thomas was to share the estate if recovered, and that it did not concern Thomas where Jaquess got money from. Thomas was not employed to raise money for Jaquess, and Thomas's payment was not conditional on money being illegally raised. This really disposes of the appeal, which must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Wontner & Sons.*
Solicitor for respondent: *Rolt.*

M. W.

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[IN THE COURT OF APPEAL.]

ALLINSON *v.* GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION.

Medical Practitioner—General Council of Medical Education and Registration—Removal of Name from Register—Power of Court to review Decision—"Infamous conduct in a professional respect"—Judicial Inquiry—Domestic Forum—Personal Interest of Member of Tribunal—Medical Act (21 *&* 22 *Vict. c.* 90), *ss.* 28, 29.

By the Medical Act (21 & 22 Vict. c. 90) the General Council of Medical Education and Registration were established, one of their duties being to keep a register of medical practitioners. By s. 29: "If any registered medical practitioner shall, after due inquiry, be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register." The General Council, acting under the foregoing section, held an inquiry into the conduct of the plaintiff, a medical practitioner who was on the register. It was proved that he had published a great number of advertisements in newspapers, which contained reflections upon medical men generally and their methods of treating their patients, and advised the public to have nothing to do with them or their drugs. The advertisements also recommended the public to apply to the plaintiff for advice, and stated his address and the amount of the fee which he charged. The Council judged

(1) Cowp. 343. (2) [1892] 2 Q. B. 724.

that the plaintiff had been "guilty of infamous conduct in a professional respect," and directed his name to be erased from the register:—

Held, that there was evidence upon which the council could reasonably hold that the plaintiff had been guilty of infamous conduct in a professional respect, and that, this being so, the Court could not review their decision:

Held, further, that, if it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful and dishonourable by his professional brethren of good repute and competency, it is open to the council to find that he has been "guilty of infamous conduct in a professional respect."

The inquiry was instituted at the instance of the committee of a society called the Medical Defence Union, whose objects were "to support and protect the character and interests of medical practitioners; to promote honourable practice; and to suppress or prosecute unauthorized practitioners." One member of the council who took part in the inquiry had been a member and a vice-president of this society, and as vice-president was an ex-officio member of the committee. He had, however, never attended any of the meetings of the committee, and until after he had been elected a member of the council he did not know that proceedings were being taken against the plaintiff. He was elected a member of the council on May 3, and on the same day he sent in his resignation of his membership of the Defence Union. By the articles of association of that society any member might withdraw by giving two months' notice of his intention so to do, "and upon the expiration of such notice he shall cease to be a member." The inquiry was held on May 28:—

Held, that such member of the council was not disqualified from taking part in the inquiry.

APPEAL by the plaintiff against the refusal of Collins, J., at the trial of the action without a jury, to grant an injunction to restrain the defendant council from allowing the plaintiff's name to remain struck out from the medical register kept by the council, under the provisions of the Medical Act, 21 & 22 Vict. c. 90.

At the meeting of the council on May 28, 1892, the council considered the following charges which had been made against the plaintiff, Mr. Thomas Richard Allinson, by a society called the Medical Defence Union, viz., "That being a registered medical practitioner, and a licentiate of the Royal Colleges of Physicians and Surgeons of Edinburgh, he systematically seeks to attract practice by a system of extensive public advertisements containing his name and address and qualifications, and invitations to persons in need of medical aid to consult him professionally, the advertisements so systematically published by him being themselves of a character discreditable to a professional

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man." After hearing the plaintiff the council resolved: "(1.) That in the opinion of the council, Thomas Richard Allinson has committed the offence charged against him; (2.) that the offence is, in the opinion of the council, infamous in a professional respect; (3.) that the registrar be directed to erase the name of Thomas Richard Allinson from the medical register." In pursuance of these resolutions the plaintiff's name was erased from the register. One of the members of the council present at this meeting was Dr. G. H. Philipson, who had, under the provisions of the Medical Act, 1886, been appointed by the University of Durham to be a member of the council for the term of five years from May 3, 1892.

The Medical Defence Union was a society registered under the Companies Act, 1862, as a company limited by guarantee. The objects of the Union as defined by the memorandum of association were (inter alia) "to support and protect the character and interests of medical practitioners practising in the United Kingdom; to promote honourable practice; and to suppress or prosecute unauthorized practitioners." Dr. Philipson was a member of this Union. He was appointed a vice-president of the Union, and as such he became under the articles of association an ex-officio member of the council of the Union, in which by the articles the management of its affairs was vested. Dr. Philipson had never attended any of the meetings of this council, and did not reside in the place at which they were held. The articles of association contained the following clause: "Any member may withdraw from the union by giving two calendar months' notice in writing of his intention so to do, such notice to be addressed to the secretaries at the registered office of the Union, and upon the expiration of such notice he shall cease to be a member." Dr. Philipson on May 3, 1892, upon his election as a member of the defendant council, gave notice in writing of his intention to withdraw from the Union. He was not aware that proceedings were being taken by the Union against the plaintiff until he had taken his seat as a member of the defendant council.

It was proved before the defendant council that the plaintiff had been in the habit of inserting advertisements in newspapers,

in which his name and address were stated. These advertisements contained reflections upon medical men generally and their methods of treating their patients, and advised the public to have nothing to do with them or their drugs. The advertisements contained a series of answers to real or imaginary correspondents as to the proper treatment of different complaints, and there were recommendations to apply to the plaintiff for advice, the amount of the fee charged by him for advice being stated. Certain works on medical subjects written by the plaintiff were also mentioned, and their prices.

The following are specimens of the advertisements:—

"In this our nineteenth century of boasted civilization the drug doctors are not so successful in the cure of disease as were the ancients nearly 2000 years ago. Then the healers relied mostly on diet and baths, not having found out the poisonous drugs now employed. A patient is now fed up with useless and disease-producing animal broths, meat-extracts, or so-called beef tea, which contains most of the refuse which the kidneys would have thrown out if the animal had lived. The patient is usually dosed with poisonous drugs which upset his stomach, derange the other organs, greatly lessen his chance of recovery, and lengthen the duration of his illness."

Under the head of "General Advice," "Strictly avoid all drugs, medicines, pills, powders, potions, lotions, gargles, inhalations, ointments, salves, &c. Do not paint with iodine, nor use caustic, blisters, poultices, plaisters, liniments, nor splints. Do not take cod liver oil, pepsine, maltine, chemical food, or any patent medicine, no matter how much advertised."

And, in answers to correspondents, "Professional poisoners, for I can call doctors by no truer name." "Send a postal order for 5*s.*, with a stamped directed envelope, and I will send you private postal advice that will benefit you." It was also proved that the plaintiff had formerly published a pamphlet or leaflet entitled "How to avoid Vaccination," in which he suggested a method by which the effect of vaccination (which he considered an injurious operation) might be avoided by washing off the lymph immediately after the operation had been performed. Objections were made to this publication by the Colleges of

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Physicians and Surgeons of Edinburgh, and the plaintiff then undertook that he would discontinue the publication of the leaflet. After he had given this undertaking he did not himself any longer publish the leaflet. It had, however, become the property of a society called the Anti-Vaccination Society, which continued to publish it, and the plaintiff in some of his advertisements recommended his correspondents to purchase the pamphlet, and informed them where it was to be obtained.

The following is a specimen of these advertisements:—

"I do not issue the leaflet 'How to avoid Vaccination.' It belongs to the Anti-Vaccination Society. Send 2*d.* for it to Mrs. Young, 77, Atlantic Road, Brixton."

The writ in this action was issued on June 1, 1892, claiming an injunction in the terms above mentioned. The plaintiff alleged that Dr. Philipson was, by reason of his connection with the Medical Defence Union, disqualified from acting on the defendant council in reference to the charges made by the union against the plaintiff, and also that there was no evidence upon which the defendant council could reasonably come to the conclusion that the plaintiff had been guilty of "infamous conduct in a professional respect." The plaintiff alleged that the defendants had not really erased his name on this ground, but because he had adopted certain theories of medicine—a ground prohibited by s. 28 of the Act.

At the trial Collins, J., held that there was evidence upon which the defendants could reasonably come to the conclusion that the plaintiff had been guilty of infamous conduct in a professional respect, and that Dr. Philipson was not disqualified from acting on the council. Judgment was accordingly given for the defendants.

Coleridge, Q.C., and *Schultess Young*, for the plaintiff. In dealing with the question whether the name of a medical practitioner should be erased from the register, the Council are acting in a quasi-judicial capacity, and if any member of the Council has any pecuniary interest in the matter, or has or can even reasonably be suspected of having any bias, or is in effect acting both as prosecutor and judge, the decision of the Council is void:

Allbutt v. *General Medical Council of Education and Registration* (1); *Leeson* v. *General Medical Council of Education and Registration.* (2) The present case is clearly covered by the judgment of Fry, L.J., in *Leeson's Case.* (2) He differed from the majority of the Court. But the judgment of Bowen, L.J., also covers the present case. If there is something which "might give a bias" to one of the judges, that is sufficient to invalidate the decision: *Reg.* v. *Meyer* (3); *Reg.* v. *Gaisford* (4); *Reg.* v. *Fraser* (5); *Partridge* v. *General Medical Council of Education and Registration.* (6) [LOPES, L.J., referred to *Reg.* v. *Farrant.* (7)] *Reg.* v. *Henley* (8); *Temperton* v. *Russell.* (9) Dr. Philipson was evidently an active member of the prosecuting body, though he did not know anything about the prosecution of the plaintiff until the matter came before the Council.

Upon the merits, there was no evidence before the defendant Council upon which they could reasonably find that the plaintiff had been guilty of "infamous conduct in a professional respect," within the meaning of s. 29 (10) of the Medical Act. The defendants really erased the plaintiff's name because he had adopted certain theories of medicine, and that is the very thing which

(1) 23 Q. B. D. 400.
(2) 43 Ch. D. 366.
(3) 1 Q. B. D. 173.
(4) [1892] 1 Q. B. 381.
(5) 9 Times L. R. 613.
(6) 25 Q. B. D. 90.
(7) 20 Q. B. D. 58.
(8) 61 L. J. (M.C.) 135.
(9) 41 W. R. 565.

(10) Sect. 28: "If any of the said colleges or the said bodies at any time exercise any power they possess by law of striking off from the list of such college or body the name of any one of their members, such college or body shall signify to the General Council the name of the member so struck off; and the General Council may, if they see fit, direct the registrar to erase forthwith from the register the qualification derived from such college or body in respect of which such member was registered, and the registrar shall note the same therein: Provided always, that the name of no person shall be erased from the register on the ground of his having adopted any theory of medicine or surgery."

Sect. 29: "If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

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is forbidden by s. 28. The plaintiff holds what may be called fanatical opinions about the use of meat and alcohol and drugs, and he has written a pamphlet adverse to vaccination. This is the real reason why the defendants have erased his name. He undertook not to continue the publication of that pamphlet, and he has fulfilled his undertaking. The publication has been continued, not by the plaintiff, but by the Anti-Vaccination Society, whose property the pamphlet has become. The "infamous conduct" mentioned in s. 29 must be conduct infamous per se; but every kind of infamous conduct will not be sufficient. It must be infamous conduct connected with the practice of the man's profession.

Reid, Q.C., and *Muir Mackenzie*, for the defendants. With regard to the disqualification of a member of the council, the principle is clearly settled. Any pecuniary interest, however small, necessarily disqualifies. The Court will not inquire into the amount of the interest. If there is no pecuniary interest, the question is one of substance and fact—whether the Court thinks that the interest is so substantial that it is likely to have biassed the person who is acting judicially.

[LORD ESHER, M.R. Is not the question this—whether it can be reasonably supposed that he might be biassed?]

That test is sufficient for the defendants in the present case. But it is submitted that the Court ought to be able to come to the conclusion that the person in question was in fact biassed: *Reg.* v. *Farrant.* (1) In *Reg.* v. *Fraser* (2) the test is put too high.

[LORD ESHER, M.R. *Reg.* v. *Farrant* (1) seems to have been adopted in *Leeson's Case.* (3)]

A possibility of bias which is not real is not sufficient. There must be a probability of bias, not a mere possibility. It is a question of fact in each case, whether the position of the man was such that he was likely to be biassed—whether reasonable men would entertain a suspicion that he was likely to be biassed.

[DAVEY, L.J. Is not the true principle that which was stated

(1) 20 Q. B. D. 58. (2) 9 Times L. R. 613.
(3) 43 Ch. D. 366.

by Mellor, J., in *Reg.* v. *Allan* (1), "It is highly desirable that justice should be administered by persons who cannot be suspected of improper motives"?]

Dr. Philipson resigned his membership of the Defence Union on May 3, and the inquiry did not take place till May 28.

With regard to the merits of the case, there was some evidence before the council upon which they could reasonably hold that the plaintiff had been guilty of "infamous conduct in a professional respect," and therefore their decision cannot be reviewed by the Court. "Infamous conduct in a professional respect" means professional infamy—infamous conduct as a professional man. Unprofessional conduct is not necessarily infamous. A breach of a professional rule would not be enough. "Infamous conduct" must be conduct such as would make honourable men shun the person who had been guilty of it.

Coleridge, Q.C., in reply. The question is, Did the plaintiff honestly believe that the treatment which he recommended was the best mode of curing the diseases of mankind? If a man honestly believes what he says, there is no infamy in his making money by means of it.

LORD ESHER, M.R. The grounds of the plaintiff's claim to an injunction are two: First, that Dr. Philipson, one member of the Medical Council who adjudicated upon his case, was disqualified from so acting, and that that rendered the judgment not only illegal, but void. Secondly, that there was no evidence upon which the council could reasonably find that the plaintiff had been guilty of "infamous conduct in a professional respect." It is admitted that, if either of these objections can be maintained, the decision of the council was illegal and void, and in either case I presume the plaintiff would be entitled to the relief which he asks. Was, then, Dr. Philipson, who took part in the decision of the council, in a position which made his participation illegal as being against public policy? If he was, his participation certainly rendered the decision wholly void. It is said that he was incapacitated from taking part in the decision, because he was or might be biassed, and the first question we

(1) 4 B. & S. 915.

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have to decide is, whether Collins, J., was right in holding that Dr. Philipson was not disqualified. That he had any pecuniary interest in the matter is not suggested; but it is said that he might have had a bias. We are bound to act upon the decision of this Court in *Leeson* v. *General Council of Medical Education and Registration.* (1) It may be that some of us (I am not one) would have preferred that that case should have been decided according to the view of Fry, L.J.; but we are bound by the decision, and all we have to do with that case is to discover rightly what it did decide, and whether the decision embraces the present case. I think that in that case the majority of the Court decided, that where a person who has taken part in the judicial proceedings, or, you might say, has sat in judgment on the case, has any pecuniary interest in the result, however small, the Court will not inquire whether he was really biassed or likely to be biassed. The Court will say at once, It is against public policy that a person who has any monetary interest, however small, in the result of judicial proceedings should take part in them as a judge. The Court will inquire no further, but will say at once that he is disqualified. But *Leeson's Case* (1) also decides that there are other relations to the matter of a person who is to be one of the judges which may incapacitate him from acting as a judge, and they held that the crucial question is, as Bowen, L.J., said, whether in substance and in fact one of the judges has in truth also been an accuser. What is the meaning of that? The question is to be one of substance and fact in the particular case. What is the fact which has to be decided? If his relation is such that by no possibility he can be biassed, then it seems clear that there is no objection to his acting. The question is not, whether in fact he was or was not biassed. The Court cannot inquire into that. There is something between these two propositions. In the administration of justice, whether by a recognised legal Court or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position

(1) 43 Ch. D. 366.

that he might be suspected of being biassed. To use the language of Mellor, J., in *Reg.* v. *Allan* (1), "It is highly desirable that justice should be administered by persons who cannot be suspected of improper motives." I think that if you take that phrase literally it is somewhat too large, because I know of no case in which a man cannot be suspected. There are some people whose minds are so perverse that they will suspect without any ground whatever. The question of incapacity is to be one "of substance and fact," and therefore it seems to me that the man's position must be such as that in substance and fact he cannot be suspected. Not that any perversely minded person cannot suspect him, but that he must bear such a relation to the matter that he cannot reasonably be suspected of being biassed. I think that for the sake of the character of the administration of justice we ought to go as far as that, but I think we ought not to go any further. I take that to be the rule for the application of the test laid down in *Leeson's Case.* (2) Could, then, Dr. Philipson be reasonably or substantially suspected of bias in this case? This depends in each case upon the relation of the impugned judge to the matter upon which he has to adjudicate.

Now, the relation of Dr. Philipson to the matter was this. He had been a subscriber to and a member of a society called the Medical Defence Union, a society formed for the defence of the honour of the medical profession, and to protect that honour against the improper conduct of any individual member of the profession. Dr. Philipson had been a vice-president of the society, and by reason of his being a vice-president he was ex officio a member of the committee to which was intrusted the authority to complain of the conduct of any medical man and to take proceedings in relation to it. He was only ex officio a member of the committee; he never in fact acted as a member of the committee. Moreover, before the plaintiff's case came on for hearing he had resigned his membership of the society altogether, so that, if it was a good resignation, he was when the case was heard not only not a subscriber, he was not a vice-president, and he was not an ex-officio member of the committee.

(1) 4 B. & S. 915, at p. 926. (2) 43 Ch. D. 366.

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He had nothing to do with the matter. It was suggested by Mr. Coleridge on behalf of the plaintiff that, although Dr. Philipson did resign his membership, his resignation was not an accomplished fact until the end of two months after he sent it. But it seems to me that, though that may be technically so, yet the substance of the thing is that he had resigned his membership. He might perhaps have repented before the end of two months, but he did not. His resignation dates from the time when he sent it, for otherwise the two months did not begin to run. Therefore he resigned when he did resign, and he resigned so as not to act, and with the determination not to act, as a member of the committee, and he never did act again. Under these circumstances, it seems to me impossible that any reasonable person should think that he was biassed, or that in substance and in fact he could be liable to be even suspected of bias. There is nothing upon which to found a suspicion. The first objection, therefore, falls to the ground. I do not go into instances which were given during the argument, and which would make the proposition absurdly large under some circumstances. I take the decision in *Leeson's Case* (1), and say that it must be proved to the satisfaction of the Court which is asked to interfere that in substance the relation of the impugned judge to the matter was such as I have described. The first ground of objection therefore fails.

As to the second ground of objection, it is admitted that, if there was no evidence upon which the council might fairly and reasonably say that the plaintiff had been guilty of "infamous conduct in a professional respect," they went beyond the jurisdiction given to them by the Act in entertaining the case and proceeding to adjudicate upon it. If there was no such evidence, they ought to have declined to interfere. Was there, then, any evidence which justified the council in finding the plaintiff guilty of "infamous conduct in a professional respect"? I adopt the definition which my brother Lopes has drawn up of at any rate one kind of conduct amounting to "infamous conduct in a professional respect," viz.: "If it is shewn that a medical

(1) 43 Ch. D. 366.

man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency," then it is open to the General Medical Council to say that he has been guilty of "infamous conduct in a professional respect." The question is, not merely whether what a medical man has done would be an infamous thing for any one else to do, but whether it is infamous for a medical man to do. An act done by a medical man may be "infamous," though the same act done by anyone else would not be infamous; but, on the other hand, an act which is not done "in a professional respect" does not come within this section. There may be some acts which, although they would not be infamous in any other person, yet if they are done by a medical man in relation to his profession, that is, with regard either to his patients or to his professional brethren, may be fairly considered "infamous conduct in a professional respect," and such acts would, I think, come within s. 29. I adopt that as a good definition of at any rate one state of circumstances in which the General Medical Council would be justified in finding that a medical man had been guilty of "infamous conduct in a professional respect." Was there, then, evidence in the present case of such conduct? It seems to me that this question must be solved thus. Taking the evidence which was before the Medical Council as a whole, did it bring the plaintiff within the definition which I have read? Was the evidence, taken as a whole, reasonably capable of being treated by the council as bringing the plaintiff within that definition of "infamous conduct in a professional respect"? I cannot doubt that it was. It seems to me that it may be fairly said that the plaintiff has endeavoured to defame his brother practitioners, and by that defamation to induce suffering people to avoid going to them for advice, and to come to himself, in order that he may obtain the remuneration or fees which otherwise he would not obtain. If on the whole that which he has been doing could be reasonably construed as amounting to that, it comes, in my opinion, within the definition I have read, and the council were justified in saying that the plaintiff had been guilty of "infamous conduct in a professional respect."

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The second ground of objection, therefore, also fails, and in my opinion the judgment of Collins, J., was right, and the appeal must be dismissed.

LOPES, L.J. I am of the same opinion. That an accuser must not be also a judge is in accordance with public policy and natural justice, and is a principle too well-established to require any comment. A person who has a pecuniary interest in the result of an accusation cannot adjudicate on it. The inference at once arises that he is interested. But when no pecuniary interest exists or is even suggested, it is, to use the words of Bowen, L.J., in *Leeson's Case* (1), "a question of substance and of fact whether one of the judges has, in truth, also been an accuser." Again, adopting the words of Bowen, L.J., "Has the judge whose impartiality is impugned taken any part whatever in the prosecution, either by himself or by his agents"? And Cotton, L.J., said in the same case, 43 Ch. D., at p. 381, "Then, as regards the question whether they are to be considered as complainants here" (that was a case very similar to the present, the General Medical Council being concerned in it, and also the Medical Defence Union), "we ought to look to substance, and not, because this complaint is brought by the Council in the name of the Union, to say that a person, a member of a union, who has nothing to do, and can have nothing to do, with bringing forward this complaint, is to be treated as a prosecutor or as one of the persons who is bringing forward this complaint." These words are very applicable to the present case, and the result which I deduce from that case is, that in such cases the proper question to be asked is this: whether there is any reasonable—any real or substantial—ground for suspecting bias. Now, let me apply that to the present case. Was there any reasonable ground in substance and in fact for suspecting any bias in Dr. Phillipson? He was a subscriber to the Medical Defence Union. He had been a vice-president, and as vice-president he was ex officio a member of the committee which, on behalf of the union, instituted complaints such as the present. He never acted on that committee, and at the time

(1) 43 Ch. D. 336.

when this inquiry took place he had resigned his membership of the union. It was urged that his resignation did not take effect, or was not completed, for a period of two months. But I think that, in effect, he had resigned his membership. It must also be recollected that the evidence shews that he had never heard of the plaintiff's case before the inquiry. In these circumstances, I think the learned judge was quite right in coming to the conclusion that there was no reasonable ground in substance or in fact for suspecting any bias in Dr. Philipson. If that is so, the first objection taken by Mr. Coleridge fails.

Then I come to the question of "infamous conduct in a professional respect," and, in my opinion, if there was any evidence on which the council could reasonably have come to the conclusion to which they did come, their decision is final. If, on the other hand, there was no evidence upon which they could reasonably arrive at that conclusion, then their decision can be reviewed by this Court. It is important to consider what is meant by "infamous conduct in a professional respect." The Master of the Rolls has adopted a definition which, with his assistance and that of my brother Davey, I prepared. I will read it again: "If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency," then it is open to the General Medical Council to say that he has been guilty of "infamous conduct in a professional respect." That is at any rate evidence of "infamous conduct" within the meaning of s. 29. I do not propound it as an exhaustive definition; but I think it is strictly and properly applicable to the present case. Assuming it to be a definition of "infamous conduct" sufficient for the purpose of the present case, was there any evidence before the Medical Council which justified them in coming to the conclusion that the plaintiff had been guilty of infamous conduct in a professional respect within that definition? It appears to me that there was abundant evidence upon which they might find as they did. A very large number of advertisements have been brought to our notice which can only lead, I think, to one conclusion, viz., that the plaintiff was doing all he could to deter the public from consulting medical men—his professional brethren—to

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induce the public to distrust them and their remedies, and to come to him, holding himself out as the one person who could give them that relief and that assistance which they desired. In my opinion, if that were the whole of the case it would be amply sufficient to justify the action of the council. But there is another matter, to which the Master of the Rolls has not alluded, viz., the plaintiff's conduct with regard to the pamphlet on Vaccination. It appears to me that his conduct in that matter comes distinctly within the definition which I have given. The facts, shortly stated, are these: In 1887 or 1888 he published a pamphlet against vaccination, which met with great disapproval, and he promised to withdraw it, and, so far as he was concerned, it appears that he did withdraw it from circulation. But it had passed from his hands into those of the Anti-Vaccination Society, and he, knowing that, advises his patients to consult that society, being perfectly aware what advice they would get, viz., to adopt a method of effacing the effects of vaccination. In fact, he was indirectly advising those who consulted him to violate the law by which the legislature has thought it desirable to enforce vaccination. On both these grounds I think there was ample evidence to justify the council in coming to the conclusion that plaintiff had been guilty of "infamous conduct in a professional respect."

DAVEY, L.J. Nothing can be more important than to maintain intact the principle that a man shall not be a judge in his own cause, and to preserve every tribunal which has to adjudicate upon the rights or status or property of any of Her Majesty's subjects from any suspicion of partiality. Speaking for myself, if I were at liberty to discuss the judgments of the Lords Justices in *Leeson's Case* (1), I confess that my mind would go rather with the judgment of Fry, L.J. It appears to me that it states a general principle, easy of application to the circumstances of any particular case; whereas I find a difficulty in extracting from the judgments of Cotton, L.J., and Bowen, L.J., the exact principle which ought to be applied; and, moreover, they seem to me to leave too much to the inferences which have to be drawn from the circumstances of the particular case, whereas it

(1) 43 Ch. D. 366.

seems to me that the rule ought to be above and beyond the circumstances of any particular case, whether the facts suggest bias or not. I think the true rule was laid down by Mellor, J., in *Reg.* v. *Allan* (1), to which my Lord has already referred. But we are bound by the judgments of the majority of this Court in *Leeson's Case* (2), and I adopt them in the sense in which they have just been explained by the Master of the Rolls and Lopes, L.J. Applying, then, to the best of my power, the principle which is to be evolved from those judgments, I am of opinion that there is no ground for holding that Dr. Philipson was disqualified from taking part in the decision of the present case. I must add that, even if I were to adopt the judgment of Fry, L.J., or the words of Mellor, J., in their most extreme application, I should come to the conclusion that Dr. Philipson was not disqualified. What are the facts? Dr. Philipson was a vice-president of the Medical Union, and as such he was, according to the constitution of the society, a member of their council; but he did not reside in the place at which the meetings of the council were held, and he did not attend any of them, and it appears that he was not even aware of the prosecution of the plaintiff until after he had taken his seat as a member of the defendant council. That shews that Dr. Philipson was not party or privy to what has been called the prosecution of the plaintiff. Still he might be held to be disqualified, if a member of the council of the union were as such disqualified. But then comes a fact to which I attach much more importance than was apparently attached to it by the learned judge of the Court below, viz., Dr. Philipson's resignation. The inquiry into the plaintiff's conduct having been held on May 28, Dr. Philipson had, on May 3, to the best of his power, and so far as he was concerned, ceased to be a subscriber to or a member of the union. He had severed his connection with the union so far as he could; and the mere fact that by their rules two months must elapse before his resignation was complete does not seem to me to make any difference. It seems to me that it would be a straining at gnats to hold that, under these circumstances, whatever rule you adopt, Dr. Philipson was disqualified

(1) 4 B. & S. 915. (2) 43 Ch. D. 366.

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from taking part in the decision of the plaintiff's case. On the second point, I agree with the other members of the Court that there was evidence upon which the council might reasonably and properly infer that the plaintiff was endeavouring to discredit and defame the medical profession generally, and to shake the confidence of the public in other medical men, with a view to his own pecuniary advantage. The question is not whether the plaintiff is right or wrong in his views on the subject of medicine and hygiene. He may be right, notwithstanding his differences from the majority of his professional brethren. He may be in the position of Athanasius contra mundum. But there are different modes of stating one's opinions and views, and a man may be actuated by different motives in enforcing his views and opinions upon the world. In the present case the language in which the plaintiff has thought fit to express his views, and the circumstances under which and the surroundings with which his advertisements were issued, coupled with the notices to which our attention has been drawn, recommending his own works and his own advice, seem to me, when taken together, to be evidence from which the Medical Council might reasonably hold that his conduct was "infamous in a professional respect." I adopt the definition of Lopes, L.J., which has been approved by the Master of the Rolls, as at any rate a standard by which those words may be applied. There is also the plaintiff's conduct with regard to the leaflet on Vaccination after he had undertaken not to publish it. I repeat, in order that there may be no mistake about it, I do not think that Mr. Coleridge was well founded in saying that on the evidence before them the council must be taken to have condemned the plaintiff on the ground of his particular opinions on the subject of medicine or hygiene. We have not to say whether the council were right or wrong in the inference which they drew. All we have to say is, whether there was evidence on which they might, as reasonable men, have come to their conclusion. In my opinion, there was.

Appeal dismissed.

Solicitors: *Francis Miller & Co.; Warren, Murton, & Miller.*

W. L. C.

NELL *v.* LONGBOTTOM.

1894
Feb. 27;
March 6.

Municipal Corporation—Election of Mayor—Disqualification of Voters—Office of Profit—Candidate voting for Himself—Validity of Vote of disqualified Person—Interest in Lease—Letting for one Day—Right of Chairman to Vote—Casting Vote—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 12, *sub-s.* 2 (*a*); *s.* 15, *sub-s.* 4; *s.* 22, *sub-s.* 3; *s.* 42, *sub-s.* 1; *s.* 61, *sub-s.* 4.

Where by the resolution of a town council under s. 15, sub-s. 4, of the Municipal Corporations Act, 1882, a salary is attached to the office of mayor, a candidate for that office is disqualified under s. 22, sub-s. 3, from voting for himself, as he has a pecuniary interest in the matter.

Sect. 42, sub-s. 1, which renders valid the acts of a disqualified person while acting in a corporate office, does not prevent an inquiry on an election petition into the validity of a vote given by such person in virtue of such office.

Sect. 12, sub-s. 2 (*a*), which provides that a person shall not be disqualified from being a councillor by reason only of his having an interest in any lease in which the council is also interested, refers as much to a letting for one day as to a lease for a longer period.

Sect. 61, sub-s. 4, which provides that in case of equality of votes at the election of mayor "the chairman, although not entitled to vote in the first instance, shall have the casting vote," does not prevent the chairman from voting in the first instance, unless he is otherwise disqualified.

Special case stated for the opinion of the Court pursuant to the order of a judge at chambers under s. 93, sub-s. 7, of the Municipal Corporations Act, 1882.

It appeared that an election for the office of mayor of the municipal borough of Louth was held on November 9, 1893, at which the respondent and Joseph Cusworth, both being aldermen of the borough, were candidates and were duly proposed and seconded. Twenty-three persons were present at the meeting, including the retiring mayor who acted as chairman. Eleven persons voted for the respondent, and eleven for Mr. Cusworth. The chairman thereupon gave his casting vote for the respondent, and declared him duly elected. Of the eleven votes given for the respondent, one was given by the respondent himself, another was given by the chairman, and another by John Taylor, who was an alderman of the borough. With regard to the vote given by the respondent for himself, the case found that by a resolution of the town council on February 4, 1836, it was resolved

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that the mayor of the borough for the time being should be paid out of the borough fund a salary of 30*l.* for the execution of his office during his year. Such resolution had not been rescinded, and such salary had every year been paid to the mayors of the borough.

With regard to the vote given by Taylor, the case found that he was the owner of a building called "The Mart," which was let to and used by the council for the purpose of a polling station at the election of councillors for the borough on November 1, 1893, on the terms of his being paid, and he was paid, 2*l.* 2*s.* by the council for such use of it. (The evidence on this point was taken subject to the objection made by counsel for the respondent, that this question was not raised by the petition, and that no amendment of it ought to be allowed. It was agreed by the parties that the Court should say whether any amendment of the petition was necessary, and, if necessary, whether it ought to be allowed.)

Of the eleven votes given for Mr. Cusworth, one was given by William Griffin. As to this vote, the case found that Mr. Griffin, who was a chemist and druggist, had on January 2, 1893, been appointed by the Watch Committee chemist to the council, and had accordingly supplied goods to them on credit in the usual way of his trade. On November 1, 1893, he was elected a councillor of the borough, not having resigned his post of chemist to the council, and on the day of the election for mayor the sum of 1*l.* 13*s.* 4*d.* remained due and unpaid to him for goods supplied to the police and the fire brigade on behalf of the council. All such goods with the exception of half-a-gallon of oil were ordered and sold before November 1, 1893. The half-gallon of oil which cost 4*d.* was ordered and sold on November 2, 1893, at a time when Griffin was not in his shop.

Mr. Cusworth was present at the meeting on November 9, but did not vote.

A petition was duly presented to the High Court of Justice alleging that "for the reasons therein stated" the respondent was not duly elected by a majority of lawful votes, and praying that it might be determined that the respondent was not duly elected, and that the said Joseph Cusworth was duly elected, and

ought to have been declared duly elected, to the office of mayor. The petition did not contain any reference to the vote of John Taylor.

William Graham, for the petitioner.
A. T. Lawrence, for the respondent.

Cur. adv. vult.

March 6. The judgment of the Court (Mathew and Cave, JJ.) was read by

CAVE, J. This is a special case stated with reference to the election of Mr. Longbottom as mayor of Louth.

The first objection arose with reference to the fact that Mr. Longbottom voted for himself as mayor, that being an office to which by a resolution of the town council passed on February 4, 1836, the salary of 30*l.* per annum was attached. The vote so given was, it was alleged, rendered invalid by the Act of 1882, s. 22, sub-s. 3, which enacts that, "a member of the council shall not vote or take part in the discussion of any matter before the council or a committee in which he has directly or indirectly by himself or by his partner any pecuniary interest." When Mr. Longbottom was proposed as mayor, it is contended that he had a direct pecuniary interest in the result, and, consequently, that he was disqualified from voting on the motion. For the respondent it was urged that, inasmuch as by s. 12, sub-s. 1 (*a*), a man may be elected a councillor notwithstanding that he holds the office of mayor and that such office may be a place of profit, he may also vote for himself as mayor notwithstanding that it may be a place of profit. It is difficult to see the bearing of this argument; and we are of opinion that the vote was bad and must be struck off. As the votes were originally eleven for Mr. Longbottom and eleven for Mr. Cusworth, his opponent, this decision places Mr. Longbottom in a minority of one.

The respondent thereupon contended that one of the votes given for Mr. Cusworth, that of Mr. Griffin, was bad, inasmuch as at the time of his election as councillor he held an office or place of profit in the gift of the council (s. 12, sub-s. 1 (*a*)), and also had a share or interest in a contract or employment

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with, by, or on behalf of the council, contrary to clause (*c*) of the same section and sub-section. It appears that the appointment of chemist to the council entitles the person appointed to supply goods, in the way of his business as a chemist and druggist, to the police and to the fire brigade, and that Mr. Griffin, who held this office, had not resigned the appointment before his election, and had after his election supplied a member of the fire brigade on behalf of the council with fourpence-worth of oil. The first answer made to this was that the contract was a very small one. That, however, is a matter into which we cannot enter, as the legislature has not entrusted us with any dispensing power, and probably considered the maxim of obsta principiis should apply to cases of this class. The second answer was that s. 42, sub-s. 1, of the Act, which provides that "the acts and proceedings of a person in possession of a corporate office and acting therein shall, notwithstanding his disqualification or want of disqualification, be as valid and effectual as if he had been qualified," prevents the vote from being questioned. When, however, we refer to s. 87, sub-s. 1, which provides that a municipal election may be questioned by an election petition on the ground (*d*) that the person whose election is questioned was not duly elected by a majority of lawful votes, it is clear that, although in ordinary cases the act of an unqualified person could not be questioned, on an election petition the question whether a particular vote is a lawful vote is intended to be raised and decided. The objection, therefore, is fatal; and the votes are once again reduced to an equality.

The next objection was one made by the petitioners to the vote of John Taylor, who had let a building called "The Mart" to the council for the purposes of a polling station for the election of councillors on November 1st last, on the terms that he was to be paid two guineas for the use of it. A preliminary objection was taken on behalf of the respondent that the petition did not raise this question, and that no amendment could or ought to be allowed; and it was agreed that the Court should say whether any amendment was necessary, and if necessary whether it ought to be allowed. We are clearly of opinion that in order to raise this question an amendment of the petition was

necessary, and that, in the absence of any evidence of the circumstances under which the omission was made and subsequently discovered and put forward, no amendment, even if possible, ought to be allowed. The objection, however, is of no importance in this case, as the contract seems to us to be within s. 12, sub-s. 2 (*a*), as a lease of land. An interest in a lease for a year would clearly be within the exception; and therefore a lease for a month, a week, or a day must equally be within it. This vote being good, the votes still remain equal.

It was next objected, on the part of the petitioners, that the chairman of the meeting at which the election was held was ipso facto disqualified from voting. No authority for this proposition was produced; and we cannot see why a member of a meeting, otherwise entitled to vote, should be disfranchised, either because he is entitled to preside by reason of his office, or because he is selected for that position by the votes of his fellows. It is true that very often he does not vote until it has been ascertained that the other votes are equal; but, when that is the case, the chairman votes, not because he is chairman, and as such has a vote only in the case of an equal division among the other members of the meeting, but by reason of his right to vote as a duly qualified member of the meeting. When, as the result of the chairman's giving his vote, the numbers on either side become exactly equal, the common law appears to have provided no way out of the difficulty. The institution of a second or casting vote, as it is called, is the creature of the statute law introduced for the purpose of avoiding the deadlock which would otherwise ensue. It was introduced into parish meetings by Sturges Bourne's Act many years ago, and is to be found in ss. 35 and 69 of the old Municipal Corporations Act of William IV. (1) A similar provision is made as to ordinary meetings in the Act of 1882 by the 2nd Sched. r. 11. So, again, with regard to the election of aldermen, it is enacted by s. 60, sub-s. 6, that in case of equality of votes the chairman shall have the casting vote, with a proviso that that is not to be understood as giving him a first vote if he is otherwise disqualified. The words there are: "Although, as an outgoing alderman or otherwise, not entitled to

(1) 5 & 6 Wm. 4, c. 76.

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vote in the first instance." A similar provision with reference to the election of mayor is found in s. 61, sub-s. 4, where the words are, "in case of equality of votes the chairman, although not entitled to vote in the first instance, shall have the casting vote." The words "although not entitled to vote in the first instance" appear to be inserted with the same intention as those inserted in s. 60, sub-s. 6—that is to say, to make it clear that the gift of a casting vote was not intended to confer a right to a first vote when none such existed in fact. If the legislature had intended in s. 61, sub-s. 4 (contrary to its manifest intention in other parts of the Act), to impose a positive disqualification on a chairman, one would have expected it to be done in express terms. The absence of any words equivalent to "as an outgoing alderman or otherwise," in s. 60, sub-s. 6, is probably attributable to the fact that the legislature desired to make it clear that no first vote was intended to be given where none previously existed, although not at the moment prepared, as in the case of the election of aldermen, to specify a case in which such right to a first vote could not exist.

In our opinion the vote was good. That makes the voting equal; and as it is admitted that the chairman had a second or casting vote, and exercised such vote in favour of the respondent, it follows that he was duly elected, and that the petition must be dismissed.

As, however, the petition was due in great measure to the conduct of the respondent in giving an illegal vote for himself, we are of opinion that it should be dismissed without costs.

Petition dismissed.

Solicitors for petitioner: *Collyer-Bristow & Co., for Wilson & Son, Louth.*

Solicitors for respondent: *J. Plaskitt, for Bell, Ingoldby, & Sharpley, Louth.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1894
Jan. 25, 26; *Feb.* 7.

AITKEN, LILBURN & CO. *v.* ERNSTHAUSEN & CO.

Ship—Charterparty—Default in Loading a Full Cargo—Damages—Freight earned by Shipowner.

The defendants chartered the plaintiffs' ship for the carriage of a full cargo of jute at 1*l.* 17*s.* 6*d.* per ton. By the charterparty, which contained the usual exception of "fire," it was stipulated that the captain should sign bills of lading at any rate of freight without prejudice to the charterparty or to the owner's lien, provided that the bill of lading freight in the aggregate should fully cover the freight due under the charterparty (5600*l.*). The defendants shipped 1519 tons under bills of lading, making freight payable at 1*l.* 5*s.* per ton. A fire broke out, which destroyed 1000 tons of the goods so shipped, and delayed the sailing of the ship. The defendants refused to load any more goods, upon which the plaintiffs filled up the ship with goods—some at 1*l.* 5*s.* per ton, some at a lower rate. In an action by the plaintiffs for breach of the charterparty, in not loading a full cargo:—

Held, affirming the decision of Pollock, B., that the space occupied by the goods destroyed by fire was taken out of the charterparty, the defendants not being liable to pay freight in respect of such goods, nor bound nor entitled to ship fresh cargo to fill up the space which had been occupied by them, and that the freight which the plaintiffs received from other persons for goods carried in such space belonged to the plaintiffs, and ought not to be taken into account in reduction of the damages recoverable from the defendants:

Held, further, that the fire only absolved the defendants from payment of the freight which would have been payable on the goods destroyed by fire according to the bills of lading, and that after the fire the total amount of freight for which the defendants were liable was 5600*l.*, less 1*l.* 5*s.* per ton, on the 1000 tons destroyed by fire, not 5600*l.*, less the charter freight of 1*l.* 17*s.* 6*d.* per ton, on such 1000 tons.

Action by shipowners for breach of a charterparty.

The plaintiffs were shipowners in Glasgow. On November 17, 1891, they, by their agents at Calcutta, entered into a charterparty with the defendants, who were merchants carrying on business at Calcutta and London. By this charterparty the plaintiffs agreed to receive on board the ship *Loch Broom*, and to carry to New York, Dundee, or Hamburg, and the defendants agreed to ship, a full cargo of jute in well-pressed bales. The charterparty contained the following exception applicable to both parties: "The act of God, perils of the sea, fire, &c.,

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strandings and other accidents of navigation excepted." The freight for Dundee or Hamburg was to be 1*l.* 17*s.* 6*d.* per ton delivered. A ton consisted of five bales. It was provided that the shippers might ship goods at any rate of freight, provided they made up the total amount of freight. The capacity of the ship was estimated at 15,061 bales, and the total amount of freight which the shippers undertook to make up was 5647*l.* 17*s.* 6*d.*

Before January 3, 1892, the shippers put 7545 bales on board, the freight specified in the bills of lading being 1*l.* 5*s.* per ton. On that day a fire occurred which destroyed 5458 bales, and considerably damaged the ship. This occasioned a month's delay, and the shippers, on the ground that the ship could not fulfil the terms of the charterparty, insisted that they were released from further observance of it, and refused to put any more cargo on board. The owners reshipped the 2087 bales which had been saved from what the shippers had put on board, and completely filled up the rest of the ship with cargo obtained from other shippers at a lower rate of freight. They received from these other shippers for freight 2862*l.* 7*s.*, and from the defendants 1069*l.* 13*s.* 9*d.*; making a total of 3932*l.* 0*s.* 9*d.*

The defendants contended that, if not released from the obligation to ship a complete cargo, they were exonerated by the fire from freight at 1*l.* 17*s.* 6*d.* per ton on the goods burnt—i.e., from 2046*l.*—reducing their liability for freight to 3601*l.* 17*s.* 6*d.*; and that as the plaintiffs had received 3932*l.*, the defendants were under no liability at all, and the action ought to be dismissed; but that if so much of the freight received by the plaintiffs as was attributable to the space occupied by the burnt goods ought not to go in mitigation of damages, then they were liable for 718*l.* 4*s.*; and they paid into Court 775*l.*, as more than sufficient to cover damages.

The plaintiffs contended that the space occupied by the burnt bales was taken out of the charterparty, and that the freight received for it belonged to them, and ought not to go in mitigation of damages. They further contended that the defendants were exonerated from freight, as regarded the space occupied by the burnt bales, only by the amount of freight which those bales

would have brought in had they reached their destination—viz., 1*l.* 5*s.* per ton. That the liability for freight was thus reduced to 3729*l.* 18*s.* 9*d.*, instead of 3601*l.* 17*s.* 6*d.*; and that deducting from this 1069*l.* 13*s.* 9*d.*, received from the shippers, and 1812*l.* 19*s.* 9*d.*, received from other shippers for the space which the defendants had never filled up, there remained a balance of about 845*l.* The 1812*l.* 19*s.* 9*d.* was reckoned by allowing 1*l.* 5*s.* per ton. If the average freight earned by the owners for the parts of the ship for which they found a cargo was taken as the basis, then the figure was 1710*l.* 18*s.* 11*d.*, instead of 1812*l.* 19*s.* 9*d.*

At the trial the defendants abandoned the defence that they were not liable to go on to load a complete cargo. Pollock, B., held that the amount they had paid into Court was the proper one, and dismissed the action with costs, ordering the money to be paid out of Court to the plaintiffs.

The plaintiffs appealed on the ground that they were entitled to a judgment for further damages. The defendants gave notice of cross-appeal, asking that the 775*l.*, or some part of it, might be paid out to them.

Jan. 25, 26. *Bigham, Q.C.*, and *Leck*, for the plaintiffs. It may be admitted as a general proposition that if a charterer makes default in loading the ship, so that the shipowner cannot earn the freight to which he is entitled, it is the duty of the shipowner to fill the ship himself, if he reasonably can do so, and to set off the freight so earned in reduction of the damages recoverable from the charterer. The plaintiffs are willing to act on that principle in the present case; but it does not apply to the portion of the ship which had been occupied by the goods which were burnt. As to those goods, the defendants were not in default; they performed their part of the contract by putting them on board, and although the plaintiffs were not able to earn the freight for them by reason of the accidental fire, they cannot come upon the defendants for damages for the loss. Therefore the portion of the ship occupied by those bales was taken out of the charterparty, the contract was performed with respect to it, and the plaintiffs might deal with it as if it had never

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been in the charterparty—as if, in fact, it had been part of another ship.

But in the calculation of the freight which would have been earned by the defendants if the bales had not been burnt, the learned judge has taken the freight at 1*l.* 17*s.* 6*d.* a ton, whereas it was only 1*l.* 5*s.* according to the bills of lading, making a difference of 128*l.* 1*s.* 3*d.* Therefore, the damages primâ facie payable by the defendants ought to be increased by that sum of 128*l.* 1*s.* 3*d.*, in order to make up the total amount for which they were responsible to the sum which was agreed upon in the charterparty, namely, 5647*l.* 17*s.* 6*d.* This addition will increase the damages to more than the sum paid into Court. With respect to the rate at which the freight on the goods which the plaintiffs loaded on their own account ought to be calculated, the proper sum is the average rate of the whole of the goods which the plaintiffs took on board, not the larger sum of 25*s.* a ton which the defendants claim.

Reid, Q.C., and *Lawrence*, for the defendants. The defendants are entitled to have all the freight which the plaintiffs earned on their own account in any part of the ship set off in deduction of the damages recoverable from the defendants: *Smith* v. *M'Guire.* (1) The defendants chartered the whole ship, and they cannot divide it into imaginary compartments. The whole result of the voyage must be looked to, and whatever the shipowner makes out of the ship must go in reduction of damages. Now, the total freight agreed for was 5647*l.* 17*s.* 6*d.* The fire relieved the defendants from freight for 5458 bales, at 1*l.* 17*s.* 6*d.* per ton, i.e., from 2046*l.*, leaving the amount for which they were liable 3601*l.* 17*s.* 6*d.* The plaintiffs have received from the defendants 1069*l.* 13*s.* 9*d.*, and from other shippers 2862*l.* 7*s.*, making together 3932*l.* 0*s.* 9*d.*, so that the plaintiffs have no claim against the defendants, who ought to receive back what they paid into Court. But if the plaintiffs are not bound to apply in mitigation of damages the freight they received for goods carried in the space made vacant by the fire, the 2862*l.* 7*s.* is reduced to 1878*l.* 15*s.*, and the sum to be deducted from the 3601*l.* 17*s.* 6*d.* is, after allowing commission for getting the fresh

(1) 3 H. & N. 554, at p. 565.

cargo, 2883*l.* 9*s.* 6*d.*, leaving a balance of 718*l.* 4*s.*, which is covered by the sum paid into Court.

Bigham, Q.C., in reply.

Cur. adv. vult.

1894. Feb. 7. LINDLEY, L.J. The judgment which will be read by A. L. Smith, L.J., is to be taken as being also mine.

KAY, L.J. Under the charterparty in this case the total freight which would have been due, if no accident had occurred, was 5647*l.* 17*s.* 6*d.*, being the freight of 15,061 bales of jute at 1*l.* 17*s.* 6*d.* per ton; 7545 bales were supplied by the shippers; of these 5458 were burnt. This accident was excepted by the charterparty, so that those bales were lost to the shippers, and the freight in respect of them was lost to the shipowners. The freight lost, at 1*l.* 17*s.* 6*d.* per ton, would be 2046*l.*, and, deducting this from the total freight, 5647*l.* 17*s.* 6*d.*, there would remain 3601*l.* 17*s.* 6*d.* as the total freight to which the shipowners were entitled under the charterparty. The owners have received on bills of lading for the shippers' cargo actually carried 725*l.* 18*s.* 9*d.*, and also 343*l.* 15*s.* cash paid by the shippers, making together 1069*l.* 13*s.* 9*d.* Deduct this from the 3601*l.* 17*s.* 6*d.* freight due under the charterparty, and there remains 2532*l.* 3*s.* 9*d.* The charterers broke their contract by not shipping any more jute than the 7545 bales. The owners shipped cargo on their own behalf, for which they received freight amounting to 2862*l.* 7*s.* Upon the whole voyage, therefore, the owners suffered no damage, except that they lost part of the freight on the burnt goods.

The general rule is, that when such a breach by non-delivery of cargo occurs the owners are entitled to damages to the amount of the freight thereby lost. But if they fill up the ship on their own account, the amount of freight so earned goes in reduction of such damages: *Smith* v. *M'Guire*. (1) This general rule is not denied, but it is argued that it does not apply to the cargo put into the space left vacant by the burnt bales. The shippers were not bound to refill this space; and the owners, it

(1) 3 H. & N. 554, at p. 565.

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Kay, L.J.

is argued, might use it on their own account to recoup themselves the amount of freight which they would otherwise lose by the fire. That is, the charterparty should be treated as if, in the event which happened, it was for a portion of the ship only, excluding the part left vacant by the fire, and the shippers cannot claim that the freight for goods carried in that part of the ship should be deducted from the damages for which they are liable. The question is a nice one, and seems to be untouched by authority. Suppose the charterparty to have been for half the carrying capacity of the ship, the owners being at liberty to use the other half, and that the shippers only supplied goods enough for a quarter, so that half the freight was due as damages, and suppose that the owners could not obtain cargo for more than their own half of the ship, it would be manifestly unjust to deprive them of any part of the freight for that half in reduction of the damages payable by the shippers. I am inclined to think that is perfectly analogous to the position of affairs under this charterparty after the occurrence of the fire. The charterparty was, under the actual circumstances, for a part of the ship only, excluding that portion which the fire rendered vacant. The space so left I think the owners might use in any way consistent with the voyage—that is, they might ship, as they did, cargo on their own behalf for the same voyage in that part of the ship, and the freight for that cargo ought not to go in reduction of the damages payable by the shippers. The damages, in this view, can only be reduced by the freight obtained by the owners for those portions of the ship which the shippers ought to have filled. This, the owners say, was 1710*l.* 18*s.* 11*d.* They claim to deduct commission for procuring the new freight 65*l.* 16*s.* 4*d.*, leaving 1645*l.* 2*s.* 7*d.* to be deducted from the 3601*l.* 17*s.* 6*d.* damages, leaving 1955*l.* 14*s.* 11*d.* damages payable on that calculation.

But the owners contend that 3601*l.* 17*s.* 6*d.* is not the proper amount of damage primâ facie payable. The burnt goods have been treated in that calculation as though the freight for them was at the rate of 1*l.* 17*s.* 6*d.* a ton. In fact, it was less by about 128*l.* 1*s.* 3*d.*, as is shewn by the bills of lading. The charterparty allowed the shippers to fill the ship at any rates they

pleased, so that the whole freight reached 5647*l.* 17*s.* 6*d.*, and, in fact, the cargo put on board was shipped at a lower rate. I think the owners are right, and that the fire only absolved the shippers from so much of the freight as would have been actually received for the goods burnt, and that this 128*l.* 1*s.* 3*d.* ought to be added to the damages in favour of the owners. This would leave, if my calculation is right—955*l.* 15*s.* 2*d.* plus 128*l.* 1*s.* 3*d.*, that is, 1083*l.* 16*s.* 5*d.*, as the amount of damages recoverable.

Another question is, whether the owners can take the average freight per ton of what they themselves shipped, or whether they ought not to take 25*s.* per ton. This is the rate which in their own accounts they did credit the shippers with as against the damages claimed. Charging 25*s.* per ton, the figures are somewhat altered. The sums to deduct from the 5647*l.* 17*s.* 6*d.* on that computation are: B.L., 2644*l.* 12*s.* 6*d.*; cash, 343*l.* 15*s.*; 7516 bales at 25*s.*, 1879*l.*; total deduction, 4867*l.* 7*s.* 6*d.*, leaving 780*l.* 10*s.* Add commission, 65*l.* 15*s.* 3*d.*—846*l.* 5*s.* 3*d.* The sum paid into Court was 775*l.*, which leaves 71*l.* 5*s.* 3*d.* still due.

The judgment should be for the amount paid into Court plus 71*l.* 5*s.* 3*d.*

A. L. SMITH, L.J. This action is brought by shipowners to recover damages for a breach of charterparty by the defendants in not having loaded the plaintiffs' ship with a full and complete cargo in accordance therewith. The defendants by their pleadings traversed the breach, and also set up that by reason of a fire which had broken out on board the ship at the port of loading they were absolved from the performance of their contract. By way of amended defence they subsequently, whilst denying liability, paid 775*l.* into Court.

The case came to trial before Pollock, B., at the Guildhall, when the breach was admitted, and the sole question which had then to be tried was the amount of damages, if any, the plaintiffs were entitled to recover. Pollock, B., found that the amount paid into Court was sufficient, and gave judgment for the defendants, and ordered the 775*l.* to be paid out to the plaintiffs.

The plaintiffs appeal to this Court upon the ground that the

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Baron should have held that the sum paid in was not sufficient, and should have given judgment for them in excess of that amount. The defendants also appeal upon the ground that the learned judge should have found that the plaintiffs had suffered no damage at all, and that the 775*l.* should have been ordered to be paid out to them, or in the alternative some portion of it.

By a charterparty dated November 17, 1891, the plaintiffs and defendants contracted that, except prevented by fire, the plaintiffs' ship, the *Loch Broom*, should receive from the defendants, and that the defendants should load at Calcutta, a full and complete cargo of jute in bales, each bale not exceeding 400 lb. net weight, and not exceeding in measurement at the time of shipment an average of 52 cubic feet for five bales, and that the plaintiffs should deliver the same at Dundee. Freight was to be paid in cash at the rate of 1*l.* 17*s.* 6*d.* per ton on right delivery of the cargo, and the captain was to sign bills of lading at any rate of freight without prejudice to the charterparty or to the owners' lien, provided that the bill of lading freight in the aggregate should fully cover the freight due under the charterparty. A full and complete cargo of jute under this charterparty would have consisted of 15,061 bales, which, at 1*l.* 17*s.* 6*d.* per ton, would have earned a freight of 5647*l.* 17*s.* 6*d.*

The defendants commenced to load a cargo of jute in bales pursuant to the charter, when a fire broke out and destroyed 5458 of 7545 bales which had then been shipped by the defendants. They thereupon refused to continue loading the ship, asserting that, by reason of the fire which had taken place, they were absolved from further performance of their contract. This position, however, as before stated, the defendants abandoned at the trial, and admitted that they were bound to have loaded the residue of the cargo which they had not loaded when the fire broke out.

In my judgment, the position of the plaintiffs and defendants under the charterparty after the fire was as follows: On the one hand, the plaintiffs could not insist upon the defendants reloading cargo to take the place of that which was burnt; and, on the other hand, the defendants could not insist (if they had been so minded) on so doing. Each party, as regards those bales shipped

and burnt, had pro tanto fulfilled their respective obligations under the charterparty—the defendants by loading them, and the plaintiffs being exempted from carrying them on the contracted voyage. The defendants were under no liability to pay freight for the bales burnt, and the plaintiffs had lost that freight. The space theretofore occupied by the burnt bales became vacant space in the plaintiffs' ship, and the only obligation then attaching to the defendants was to fill up the residue of the space in the plaintiffs' ship, and when this was done they would have loaded a full and complete cargo pursuant to the charter. This obligation the defendants refused to perform, and it is for breach of this that the present action is brought. It is not disputed that, when the defendants refused to perform this obligation, it was incumbent upon the plaintiffs to do what was reasonable to mitigate the damages which the defendants would have to pay by reason of their breach of contract, and that, if the plaintiffs could reasonably obtain other cargo to fill up the space which the defendants had wrongfully refused to fill up, they were bound to do so. The plaintiffs did find other cargo and filled up that space, and they give credit, against the damages they seek to recover from the defendants in this action, for the freight earned by the carriage of such cargo.

The defendants, however, insist that the plaintiffs were under obligation to do more—viz., to fill up, if they could, with other cargo for the defendants' benefit the space left vacant by the burnt jute, and they assert that, as the plaintiffs did find other cargo with which to fill up this vacant space, the freight the plaintiffs have received for this cargo should also be credited against the damages the plaintiffs would otherwise recover from the defendants, and should not go to mitigate the loss the plaintiffs had incurred by losing their freight upon the burnt jute. In my judgment, this position taken up by the defendants is wholly untenable. No doubt, in ordinary cases, the measure of damages would be as stated by Baron Watson in *Smith* v. *M'Guire* (1)—viz., the difference between the charterparty freight and the net freight actually earned, after deducting expenses. But the provision in this charterparty as to fire

(1) 3 H. & N. 554, at p. 565.

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modifies the application of that rule to this case, by in effect reducing as between the parties to the contract the capacity of the ship by the space previously occupied by the burnt cargo. Under the charterparty the obligation of the shipowner was only, if he reasonably could, to find cargo to take the place of that cargo which the goods owner has made default in shipping, and for which default damages are, and can alone be, sought for in this action. As regards the jute burnt (i.e., the 5458 bales), the defendants have made no default, and for such no damages are or could be asked herein. For that jute the shipowner was under no obligation to try and find other cargo, for, as regards this, there were no damages to be mitigated. With the space left vacant in the ship by reason of the burnt jute the defendants had nothing whatever to do. All they had to do after the fire was to fill up the residue of the ship. If the defendants after the fire had had to fill up again the space left vacant by the burnt jute, and they wrongfully omitted to do so, I agree that then the shipowner should, if he could, have obtained other cargo for that space; but that is not the case. The shipowners might do with that vacant space what they liked so long as they did not delay the voyage upon which they had contracted to carry the defendants' goods. As before stated, the plaintiffs did fill up that space left vacant by the burnt jute so as to mitigate their own loss of freight, and now the defendants assert that they are entitled to that freight. Test it in this way. Suppose there had been no fire, and the defendants had loaded, as they did, the 5458 bales, and then refused to load any more (I leave out of consideration the difference between the 5458 burnt and the 7545 bales which were again reshipped to keep this point clear), what would have been the plaintiffs' obligation? Clearly, only to load up the space wrongfully left unfilled by the defendants, so as to mitigate that damage. In the existing circumstances the space left vacant by the burnt jute stands, as regards the defendants, in the same position as if it were filled with jute, for they have performed their contract as regards that space, and have nothing more to do with it, and the only difference is that they have had to pay no freight for that jute, and the plaintiffs have lost it. All that the defendants can call upon the plaintiffs

to do is to act reasonably in procuring cargo to take the place of that which they should have shipped, so as to mitigate their loss in respect of this, and this the plaintiffs have done. For the reasons above, in my judgment, this point fails the defendants.

The next question is this. The plaintiffs did find cargo to fill up the space which the defendants should have filled up after the fire, and for non-performance of which they are being sued in this action, and the point is, whether the defendants are to be credited with that freight which the plaintiffs did in fact earn upon goods so found and shipped, and which earned freight, at 25*s.* a ton, or whether the average of the freight earned upon all goods brought home in the defendants' ship, which is less than 25*s.* a ton, is that which is to be credited to the defendants. Upon the evidence it appears that goods which carried freight at 25*s.* per ton were shipped by the plaintiffs at Calcutta, and allocated to the defendants' breach of contract, for the purpose of mitigating the damages they otherwise would have had to pay. In these circumstances I am of opinion that the defendants must be credited with this freight—viz., 25*s.* per ton—and not at the average rate of freight of the whole goods on board, which was considerably less. In this the defendants are right in their contention.

Now as to the last point, which is this. The plaintiffs say, and say truly, that by the charterparty the defendants were bound to load a full and complete cargo, so as to bring out a freight of 1*l.* 17*s.* 6*d.* per ton all round. They say that the bill of lading freight of the cargo which was shipped by the defendants before the fire was less than the charter freight of 1*l.* 17*s.* 6*d.* for the same cargo by the amount of 128*l.* 1*s.* 3*d.* To fulfil their contract the defendants were consequently bound to load the residue of the ship, which they had not loaded, with goods which would have earned a freight in excess of 1*l.* 17*s.* 6*d.* per ton by the amount of the 128*l.* 1*s.* 3*d.*, and that this would have been so whether a fire had occurred or not. In my judgment this contention of the plaintiffs is correct, and I do not understand that, if the principle is right, the figure is disputed. This being so the defendants have not paid into Court enough by the difference between 846*l.* 5*s.* 3*d.* and the 775*l.* paid in—viz., 71*l.* 5*s.* 3*d.* I

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arrive at this in this way. I take the 718*l.* 4*s.*, which the defendants by their computation make out to be the damages payable by them, if their point about being liable to nothing is held, as it is, against them. I then add thereto the 128*l.* 1*s.* 3*d.*, which the defendants have left out of their computation. 718*l.* 4*s.* added to 128*l.* 1*s.* 3*d.* makes 846*l.* 5*s.* 3*d.*, and, deducting 775*l.* from that amount, that leaves 71*l.* 5*s.* 3*d.* still due from the defendants to the plaintiffs. In my judgment, the plaintiffs' appeal should be allowed, with costs, and judgment should be entered for them for 71*l.* 5*s.* 3*d.* in addition to the sum paid into Court, with costs in the Court below, and the defendants' appeal should be dismissed with costs. The money in Court will be ordered to be paid out to the plaintiffs if they have not yet obtained it.

Appeal allowed. Cross appeal dismissed.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Hollams, Sons, Coward, & Hawksley.*

H. C. J.

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[IN THE COURT OF APPEAL.]

WORCESTER CITY AND COUNTY BANKING COMPANY *v.* FIRBANK, PAULING & CO.

Practice—Writ of Summons—Partnership Firm, Action against—Foreign Partnership — "Carrying on Business within the Jurisdiction" — Order XLVIII. *A, rr.* 1, 3, 8.

Order XLVIII. A, rule 1, applies to all partnerships carrying on business within the jurisdiction:—

Therefore, a firm which carries on business within the jurisdiction may be sued in the firm name under that rule without leave, although it be a foreign or colonial firm, the members of which are resident out of the jurisdiction.

APPEAL from the order of a Divisional Court (Mathew and Collins, JJ.).

The facts were as follows.

The defendants were a firm consisting of two partners who carried on business in Natal. It was admitted by the defendants' counsel that, on the statements contained in the affidavits, he could not for the purposes of the appeal dispute that they also carried on business in this country. The writ in the action,

which was upon a promissory note made by the defendants in Cape Town, payable at their London office, 8, Sanctuary, Westminster, was against the firm in the firm name. No leave had been given for the issue of the writ (which was in the ordinary form for service within the jurisdiction) or for its service out of the jurisdiction. An order had been made for substituted service of the writ on Pauling, one of the partners, who resided in Natal, by serving his brother, who was not a member of the firm or manager for them, in this country; and the writ had been so served.

A conditional appearance having been entered for Pauling, an application was made on his behalf to set aside the writ, the order for substituted service, and the service, which was referred by the master to Bruce, J., sitting at chambers. The learned judge granted the application; but on appeal to the Divisional Court they reversed his decision, and ordered the writ and service to stand.

Alfred Lyttelton, for the defendants. The questions in this case are: first, whether the writ was properly issued; secondly, whether, if so, it was properly served. The issue of the writ was invalid. The effect of the affidavits is to shew that this firm was a colonial firm, and such a firm is for this purpose a foreign firm. If the members of a firm or some or one of them be resident out of the jurisdiction, then they cannot be sued in the firm name without leave under the provisions of Order XLVIII. A. The provisions of that order only apply to English firms. On the present application the defendants are not in a position to dispute that they carry on business within the jurisdiction as well as in Natal; but it is submitted that that fact does not under the circumstances make it competent to the plaintiffs to sue them in their firm name without leave. In *Grant* v. *Anderson* (1) the Queen's Bench Division held that the principle laid down in *Russell* v. *Cambefort* (2) and subsequent cases with regard to the former rules on this subject applies to Order XLVIII. A, r. 1. That principle is that an action against a partnership firm is in reality an action against the individual members of the firm; and, therefore,

(1) [1892] 1 Q. B. 108. (2) 23 Q. B. D. 526.

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where a writ cannot without leave be served on one or more of the individual members of the firm, he or they being resident out of the jurisdiction, the procedure with regard to suing partners in the firm name is inapplicable, at any rate without leave. In such a case the procedure must be under Order XI., and the leave of the Court or a judge must be obtained under that order. The words "whether any of the members thereof are out of the jurisdiction or not" in Order XLVIII. A, r. 3, are only intended to meet the case where some or one of the partners in an English firm may be temporarily abroad.

[He also cited on this point: *Western National Bank of the City of New York* v. *Perez, Triana & Co.* (1); *Heinemann* v. *Hale* (2); *St. Gobain, Chauny and Cirey Co.* v. *Hoyermann's Agency* (3); *Great Australian Gold Mining Co.* v. *Martin* (4); *Indigo Co.* v. *Ogilvy.* (5)]

Assuming that the writ was good, the substituted service was bad. It is well settled by the decisions that there cannot be substituted service in a case where there cannot be valid personal service: *Fry* v. *Moore.* (6) In this case, Pauling being out of the jurisdiction, he could not have been personally served without leave being obtained under Order XI.

Jelf, Q.C., and *Toller*, for the plaintiffs. The decisions under the rules as they existed previously to Order XLVIII. A, such as *Russell* v. *Cambefort* (7), are no longer applicable. The words "and carrying on business within the jurisdiction" appear to have been inserted in rule 1 of that order expressly for the purpose of altering the law as laid down in those decisions. The view taken by the framers of Order XLVIII. A, may be presumed to have been that, if a foreign or colonial firm carries on business in this country under the protection of our law, it is just that it should be subject to the jurisdiction, and that execution should be available against its property within the jurisdiction. The contention of the defendants imposes a limitation on the words of the order which they do not themselves justify, and in fact

(1) [1891] 1 Q. B. 304.
(2) [1891] 2 Q. B. 83.
(3) [1893] 2 Q. B. 96.
(4) 5 Ch. D. 1.
(5) [1891] 2 Ch. 31.
(6) 23 Q. B. D. 395.
(7) 23 Q. B. D. 526.

gives little or no effect to the added words "and carrying on business within the jurisdiction."

It is submitted that the substituted service was good.

A. Lyttelton, in reply.

LORD ESHER, M.R. The first question in this case is whether the writ was properly issued. The writ, which is in form for service within the jurisdiction, was issued against a firm in the firm name. The foundation of the decisions on this subject which have been cited to us is, that, although under the rules a writ may be issued against a firm in the firm name, it is really in effect a writ against all and each of the members of the firm, just as if the writ had been issued against them in their individual names; and it was therefore held under the former rules that, where a writ against partners in their individual names could not be served without leave, they or some of them being resident out of the jurisdiction, neither could a writ be issued without leave against them under the firm name. In the present case the facts are these. I think that it has been made out that this is a Natal firm, i.e., a colonial firm, as distinguished from an English firm, although it is not disputed that it also carries on business in this country. For the present purpose I think that a colonial firm is in the same position as a foreign firm, i.e., a firm in a foreign country composed of persons not subjects of the Queen; for it appears to me that for this purpose nothing turns on whether the defendants owed allegiance to the Queen; but the question is whether they are subject to the jurisdiction of this Court. The rules as they existed prior to the making of Order XLVIII. A have been construed to the effect that a writ such as this could not be issued without leave against a foreign firm, the members, or some of the members, of which were resident abroad. That has appeared to those conversant with the matter to involve a hardship, and it was for the purpose of getting rid of that hardship I believe that Order XLVIII. A was framed. In rule 1 of that order the words "and carrying on business within the jurisdiction" are used in addition to those which had been used in the former rules. In conjunction with that rule we have rules 3 and 8 of the same order. I agree with what was said by Fry, L.J., in

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Heinemann v. *Hale* (1), viz., that the rules on this subject must be construed together as forming a code. Reading rule 1 of Order XLVIII. A with rules 3 and 8, it seems to me that it is now immaterial whether the writ is against an English firm or against a foreign or colonial firm, and the only question to be considered in order to see whether the case comes within the rule is whether the firm carries on business within the jurisdiction. If the firm carries on business within the jurisdiction, then whether it is an English or a foreign firm, and whether it also carries on business in a colony or abroad or not, a writ may be issued against the partners in the firm name without leave under Order XLVIII. A, r. 1.

The first point made for the defendants therefore fails, and we must hold that the writ was properly issued.

The next point is whether it was properly served. Under Order XLVIII. A, r. 3, the writ in such a case may be served upon any one or more of the partners in England. Another mode of service under that rule is by serving it at the principal place of business of the partnership within the jurisdiction—if they have such a place of business, for it may be one thing to carry on business within the jurisdiction and another to have a place of business within the jurisdiction—upon any person having at the time of service the control or management of the partnership business there. In the present case the writ was not served in either of those ways. There was an order for substituted service on George Pauling, one of the partners, who was resident abroad, by serving the writ on his brother in this country. Suppose there had been no order for substituted service, it is clear that, Pauling being abroad, he could not have been served so as to make a good service on the firm. There cannot be a good substituted service where personal service would not be legally possible. The result is, that the writ is good and must stand, but the service is irregular and must be set aside.

I may point out that, supposing the service to have been regular, the writ in this case being issued under Order XLVIII. A, r. 1, except as to the partnership property as mentioned in rule 8,

(1) [1891] 2 Q. B. 83.

a judgment obtained in the action would not affect any partner who was out of the jurisdiction when the writ was issued and who had not appeared, unless he had been made a party under Order XI., or had been served within the jurisdiction after the writ was issued.

LOPES, L.J. I am of the same opinion. It appears to me that the result of the evidence is that this firm was a colonial firm resident in Natal. Therefore, before Order XLVIII. A, r. 1., such a writ as this, against the partners in their firm name, could not have been issued, at any rate without leave. This is clearly established by many decisions, of which *Heinemann* v. *Hale* (1) may be taken as an example. That being the then existing state of the law, great inconvenience was experienced from the fact that foreign firms who carried on business and had property in this country could not be sued or have execution issued against such property. It was, I presume, to meet that inconvenience that Order XLVIII. A was made. The rules of that order material to the present case are rules 1, 3, and 8. Rule 1 authorizes the issue of writs against partnership firms; rule 3 provides for the service of such writs; and rule 8 declares against what property execution in such cases may be had. The general scope of the procedure given by these rules appears to me to be that they authorize the issue without leave of a writ such as this against a partnership which carries on business within the jurisdiction, whether the partners reside within or without the jurisdiction, and give a special mode of serving such a writ; but when such a writ has been issued, and has been served in one of the modes pointed out by rule 3, except as against the property of the partnership, as mentioned in rule 8, the judgment will not affect any partner who was out of the jurisdiction when the writ was issued and who has not appeared, unless he has been made a party under Order XI., or has been served within the jurisdiction after the writ in the action was issued. Therefore, in my opinion, the writ was regularly issued.

The other question is as to the service. That, as I have said, can only be effected in accordance with Order XLVIII. A, r. 3.

(1) [1891] 2 Q. B. 83.

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One mode of service authorized by the rule is service on one or more of the partners within the jurisdiction; another is service at the principal place of business of the partnership, within the jurisdiction, upon the manager of such business. Neither of these modes was followed in the present case. An order was made for substituted service on a brother of one of the partners. Such service is clearly bad, for there cannot be substituted service where the writ could not at the time be served personally. In this case it could not have been served on the partner personally because he was out of the jurisdiction, and no leave had been obtained to serve it. Therefore, beyond all question, the substituted service was irregular, and must be set aside. The result is, that the writ is good but the service was wrong.

DAVEY, L.J. I agree with the judgments that have been delivered and should add nothing but for the fact that we are differing, I think, from the opinion of the Lord Chief Justice and Wright, J., in *Grant* v. *Anderson*. (1) It is clear that prior to Order XLVIII. A, a writ such as this would have been irregular for the reason succinctly stated by Fry, L.J., in the case of *Heinemann* v. *Hale* (2), which was as follows: Suing a firm is a short mode of suing the individual members of the firm, and therefore, where a writ could not issue against the members of the firm in their individual names without leave, a writ could not issue without leave against the firm in the firm name. The principle so applied to the old rules did not depend on the firm being a foreign firm in the sense that its members were foreigners, not subjects of the Queen; but it applied in all cases where one or more of the partners appeared to be resident out of the jurisdiction. That this was so is clear from the case of *Indigo Co.* v. *Ogilvy*. (3) In my opinion Order XLVIII A. has laid down a fresh rule which has entirely altered the law on the subject. The test now for determining whether partners can be sued in the firm name is whether they carry on business within the jurisdiction, not whether the firm is an English or a foreign or colonial firm. If they do so carry on business, the case is brought within rule 1

(1) [1892] 1 Q. B. 108. (2) [1891] 2 Q. B. 83.
(3) [1891] 2 Ch. 31.

of the order. The question how in such a case service is to be effected does not depend on rule 1, which has nothing to do with service. The mode of serving such a writ, when it is properly issued, is provided for by rule 3 of the same order. That rule provides that "the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and subject to these rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary." This rule therefore does what the old rules on the subject of suing firms did not: it extends the effect of the rules as to service out of the jurisdiction, and meets the difficulty which existed in *Heinemann* v. *Hale*. (1) The provisions of rules 1 and 3 must be read with those of rule 8, which guards against the possibility of any injustice through the operation of the previous rules, where one or more members of the firm are out of the jurisdiction, by providing that, except as to any property of the partnership, the judgment shall not affect any partner who was out of the jurisdiction when the writ was issued, and who has not appeared to the writ, unless he has been made a party to the action under Order XI., or has been served within the jurisdiction after the writ in the action was issued. These provisions appear to me to form a clear and reasonable code of rules with regard to suing and enforcing judgment against a partnership which is carrying on business under the protection of our law. For these reasons I think that this writ, being issued against a firm which it has been admitted for the purpose of this argument does carry on business within the jurisdiction, was regularly issued.

The remaining question is as to the service. One of the partners was resident out of the jurisdiction when the writ was issued. A person out of the jurisdiction cannot be served with a writ except under Order XI. by leave of the Court or a judge. Therefore, clearly such partner could not have been personally served. The plaintiffs obtained an order for substituted service

(1) [1891] 2 Q. B. 83.

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upon him. It is obvious that such service was bad. The rule established by the decisions on the subject, such as *Fry* v. *Moore* (1) and *Wilding* v. *Bean* (2), is that there cannot be substituted service on a person on whom personal service could not be validly effected. It appears to me, therefore, that the writ was regularly issued against the firm in the firm name, and might have been served in either of the modes provided for by rule 3, but that the substituted service was irregular and must be set aside.

Order accordingly.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Smith, Pinsent & Co., Birmingham.*

Solicitors for defendants: *Slaughter & May.*

E. L.

1894 *March* 15.

WIGRAM *v.* COX, SONS, BUCKLEY & CO.

Practice—Partners—Action against Partners in name of Firm—Dissolution of Partnership before Action commenced—Service of Writ on retired Partner —Judgment against Firm—Execution—Order XLVIII. *A, rr.* 1, 3, 8.

Where an action is brought and judgment is recovered against co-partners in the firm name, if one of the members has left the firm to the knowledge of the plaintiff before the commencement of the action, and does not appear to the writ in his own name or admit that he is, or has not been adjudged to be, a partner, the plaintiff—in order to be entitled to obtain leave to issue execution against such member, or to have the question of his liability tried, under rule 8 of Order XLVIII. A—must have served him with the writ in accordance with the proviso to rule 3.

APPEAL from an order of Grantham, J., at chambers.

In an action to recover the amount of certain promissory notes given to the plaintiff by the firm of Cox, Sons, Buckley & Co., the defendants were sued in the firm name, and the writ of summons was served at the place of business of the firm, under Order XLVIII. A, rr. 1, 3.

When the promissory notes were given, the firm consisted of three partners, of whom S. H. Gifford was one, but he had retired from the firm before the commencement of the action, and the plaintiff, before he commenced the action, knew that

(1) 23 Q. B. D. 395. (2) [1891] 1 Q. B. 100.

S. H. Gifford had so retired. S. H. Gifford was not individually served with the writ as a partner, nor did he appear to the writ in his own name, nor admit on the pleadings that he was, nor had he been adjudged to be, a partner in the firm.

The plaintiff recovered judgment, in default of the delivery of a defence, against the defendant firm for the amount claimed and costs, and subsequently took out a summons for an order, under Order XLVIII. A, r. 8, for "liberty to issue execution, or otherwise proceed against S. H. Gifford, as being a member of the firm of Cox, Sons, Buckley & Co., the above-named defendants, upon the judgment obtained herein."

Upon the hearing of this summons the master made an order that the plaintiff and S. H. Gifford proceed to the trial of an issue, the question to be tried being whether S. H. Gifford was liable for the debt and costs in the action as recovered by the judgment therein, and was liable to have enforced against him all the remedies open to the plaintiff on such judgment.

Grantham, J., at chambers, having affirmed the master's order, S. H. Gifford appealed.

Dickens, Q.C. (*W. H. B. Lindsell,* with him), for the appellant. The plaintiff, not having served the writ of summons upon the appellant, under rule 3 of Order XLVIII. A, is not entitled to leave to issue execution against him, or an order for an issue to try the question of his liability under rule 8. (1) That rule

(1) By Order XLVIII. A, r. 1: "Any two or more persons claiming, or being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action."

By rule 3: "Where persons are sued as partners in the name of their firm under rule 1, the writ shall be served, either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm so sued, whether any members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary: Provided that in the case of a co-partnership which has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ of summons shall be served upon every person within the jurisdiction sought to be made liable."

By rule 8: "Where a judgment or order is against a firm, execution may

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has no application to cases coming within the proviso to rule 3, where the plaintiff knows that the partnership has been dissolved before the commencement of the action. The words "any other person" in rule 8 mean any person who has been served with the writ after the dissolution. [He was stopped.]

H. Tindal Atkinson, for the respondent. The master had jurisdiction to make the order, and the learned judge was right in affirming it. The judgment recovered against the firm is a judgment against all the three partners. In *Western National Bank of New York* v. *Perez, Triana & Co.* (1), Lindley, L.J. (at p. 314), says: "A plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names." The plaintiff, where he knows that one of the partners has retired before the commencement of the action, has alternative courses to take. He may serve the retired partner under rule 3, or may proceed against him, after judgment, under rule 8. Rule 3 deals only with procedure.

[WRIGHT, J. Was not the object of these rules to get over the difficulties arising from the decisions in *Kendall* v. *Hamilton* (2) and *Cambefort* v. *Chapman*? (3) By construing the proviso to rule 3 as being imperative, full effect is given to rule 8, which would apply where one of the members had gone out of the firm before the commencement of the action without the plaintiff's knowledge.]

It is submitted that such a construction is unnecessary. Rule 8 gives ample protection to the partner who has retired:

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issue (*a*) against any property of the partnership within the jurisdiction; (*b*) against any person who has appeared in his own name under rule 5 or 6, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner; (*c*) against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear. If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave to do so, and the Court or judge may give such leave if the liability be not disputed; or if such liability be disputed may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined."

(1) [1891] 1 Q. B. 304.

(2) 4 App. Cas. 504.

(3) 19 Q. B. D. 229.

if he disputes his liability he may have an issue to determine the question.

CAVE, J. I am of opinion that the contention of the respondent's counsel cannot be supported. Order XLVIII. A deals with the mode of suing firms. Rule 1 provides that two or more persons being liable as co-partners may be sued in the firm name. Then comes the question whether, when a firm, say of three members, is altered by one of the members going out, and the two remaining members continue to carry on business in the same firm name, service, under rule 3, upon one of the remaining members or upon the manager of the firm at their place of business, is to be deemed service upon the member who has gone out. The proviso to rule 3 says it is not to be deemed service upon him, if the plaintiff knows of the dissolution before the commencement of the action. In that case the plaintiff must serve the member who has gone out, if he wishes to fix him with liability. There is nothing contrary to justice in that. Before the legislation permitting actions against a firm in the name of the firm, the plaintiff must have served every person against whom he issued his writ. If he did not, any judgment recovered against a person not served would have been null and void. Rule 8 goes on to provide how execution may be issued where judgment has been signed against a firm. By that rule you may issue execution against any person who has appeared in his own name under rule (5) or (6), or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner, or against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear. None of these cases apply to the appellant; but it is contended for the respondent that he was entitled to apply for and obtain an order under the latter part of that section for the trial of an issue as to the liability of the appellant. I am, however, of opinion that rule 3 overrides rule 8, and that the latter rule only applies where there has been no dissolution, or none to the knowledge of the plaintiff. Where there has been a dissolution to the knowledge of the plaintiff, he cannot make an outgoing partner liable, unless he serves the writ of summons upon him.

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Cave, J.

Here the plaintiff, although he knew when he commenced his action that the appellant was no longer a member of the firm, chose, as he had a right to do, to issue his writ against the firm in their firm name, and chose also not to serve the appellant who had gone out. Therefore, as there has been no service, either actual or constructive, upon the appellant, the plaintiff cannot proceed against him under rule 8. I am of opinion that this appeal must be allowed.

WRIGHT, J. I am of the same opinion.

Appeal allowed.

Solicitors for appellant: *Saxton & Sons.*
Solicitors for respondent: *Norris & Norris.*

W. A.

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March 7, 8.

[IN THE COURT OF APPEAL.]

ARDEN *v.* BOYCE.

Practice—Action for Recovery of Land—Judgment under Order XIV., *r.* 1—*Specially indorsed Writ—Order* III., *r.* 6—*Landlord and Tenant—Forfeiture—Notice to Quit.*

In a lease of a dwelling-house for a term of seven years there was a provision that, if any rent were in arrear for a certain time, the landlord might either forthwith determine the term by notice to quit in writing, or immediately re-enter. Rent being in arrear for the specified period, the landlord gave the tenant notice to quit, and brought an action to recover the premises:—

Held, that, the claim to recover the premises being in substance based on a forfeiture, the case did not come within the words of Order III., r. 6 (F); and therefore the writ could not be specially indorsed with such claim under that rule, and the plaintiff could not obtain leave to enter judgment for recovery of the land under Order XIV.

APPEAL of plaintiff from order of a Divisional Court (Mathew and Collins, JJ.), refusing to give the plaintiff leave to enter judgment for recovery of land under Order XIV.

The indorsement on the writ claimed possession of a house and premises which were let by the plaintiff to the defendant by a lease dated the 5th of May, 1892, at a yearly rent payable half-quarterly, which tenancy was duly determined by notice to quit in writing given in accordance with the terms of the lease: and

also a certain amount for arrears of rent of such premises. The facts were as follows.

The plaintiff had let a dwelling-house to the defendant for a term of seven years. The lease contained a provision that, if (inter alia) any part of the rent were unpaid for twenty-one days next after the same should become due, although no legal or other demand should be made for payment thereof, then, without any demand whatsoever, the lessor might either forthwith determine the term thereby created by notice to quit in writing signed by himself or his agent and left at the said premises, or at the option of the lessor posted on the door of the said dwelling-house or other conspicuous part of the said premises, or by himself or his agents immediately enter upon and take possession of the premises. Rent being in arrear for more than twenty-one days, the plaintiff gave the defendant notice to quit under the above-mentioned provision. An application by the plaintiff under Order XIV. for leave to enter judgment for possession of the premises, and for the arrears of rent, was refused by the master, and on appeal by the judge. On appeal to the Divisional Court, they gave the plaintiff leave to enter judgment for the arrears of rent, but refused leave to enter judgment for possession of the premises.

Douglas Walker, Q.C., and *J. Herbert Williams*, for the plaintiff. The question whether the procedure under Order XIV. is applicable depends on whether this is a case in which, under Order III., r. 6, the writ can be specially indorsed. The case comes exactly within the words of Order III., r. 6 (F). It is an action "for the recovery of land by a landlord against a tenant whose term has been duly determined by notice to quit." This is not the case of an action or entry as on a forfeiture. In such a case the term cannot be said to have expired or been determined by notice to quit. By the terms of this lease, in a certain event the landlord has power to give the tenant notice to quit, and, if he does so, the lease is determined by the notice. The cases decided on the language of 1 Geo. 4, c. 87, and Common Law Procedure Act, 1852, s. 213, such as *Doe* d. *Tindal* v. *Roe* (1), *Doe* d. *Carter* v. *Roe* (2), and *Doe* d. *Cundey* v.

(1) 2 B. & Ad. 922. (2) 10 M. & W. 670.

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Sharpley (1), are not applicable. The language of those statutes was not identical with that of the present rule. The ground of the decisions upon them was that the words of the statute only applied to cases where a tenancy for a term certain had expired by effluxion of time, or where a tenancy from year to year had been determined by the usual notice to quit. There is nothing in the phraseology of Order III., r. 6, to limit the expression "notice to quit" in that rule to any particular kind of notice to quit. [They also cited *Daubuz* v. *Lavington* (2); *Hall* v. *Comfort* (3); *Burns* v. *Walford* (4); *Mansergh* v. *Rimell.* (5)]

Ernest Pollock, for the defendant. The notice to quit in the present case is not such a notice to quit as is contemplated by Order III., r. 6 (F). The words of that rule are substantially similar to those of the Common Law Procedure Act, 1852, and it is submitted that, having regard to the previous legislation and decisions, they were intended to have the same effect. They contemplate the ordinary case of a tenant holding over, in the case of a tenancy for a term certain, after its expiration, or, in that of a tenancy from year to year, after its determination by notice to quit. [He cited *Friend* v. *Shaw.* (6)]

Douglas Walker, Q.C., in reply.

Cur. adv. vult.

March 8. LORD ESHER, M.R. In this case an action is brought by a landlord to recover possession of premises upon the determination of a tenancy. The question is whether the case comes within Order III., r. 6, and was therefore one in which judgment could be obtained under Order XIV. Words very similar to, though not exactly identical with those contained in Order III., r. 6, first appear in 1 Geo. 4, c. 87, s. 1, and subsequently in the Common Law Procedure Act, 1852, s. 213. It appears to me that the legislature in the latter Act intended to follow the language of the previous Act, and that the framers of Order III., r. 6, obviously intended to follow the language of the Common Law Procedure Act. Therefore I think that any decision upon

(1) 15 M. & W. 558.
(2) 13 Q. B. D. 347.
(3) 18 Q. B. D. 11.
(4) W. N. (1884) 31.
(5) W. N. (1884) 34.
(6) 20 Q. B. D. 374.

the language of the previous Acts ought to be regarded as applicable to the provisions of this rule. The decisions upon the Act of Geo. 4 are to the effect that the provisions of the Act did not apply to the case of a determination of a tenancy by forfeiture. Whether we should have arrived at that conclusion if the matter came before us now to determine for the first time, it appears to me unnecessary to consider. We have made inquiries of judges conversant with the course of practice at chambers, and we are informed that there has been a long course of practice based upon those decisions. We think that, those decisions having for so many years been acted on, we ought not now to overrule them. We therefore must hold that the case is not within Order III., r. 6, and consequently the order of the Divisional Court was right.

LOPES, L.J. This is a summary proceeding for the purpose of obtaining a judgment for the recovery of premises under Order XIV. It is not unimportant to observe that it was only in 1883 that the words which appear in Order III., r. 6 (F), and upon which this case depends, were added to the rule. It is also important to bear in mind that those words, though not precisely the same, are practically the same as those contained in 1 Geo. 4, c. 87, and reproduced in the Common Law Procedure Act, 1852. I mention that, because the similarity of the phraseology of those Acts to that of Order III., r. 6, gives the decisions on those statutes a material bearing on the present case. Having regard to those decisions and the practice which we have ascertained to have long existed at chambers, I have come to the conclusion that the procedure for summary judgment in actions for recovery of land only applies to cases where a tenancy is determined in the ordinary course by effluxion of time or by the ordinary notice to quit which may be given either by the landlord or the tenant; that is to practically undefended cases, where a tenant holds over after the expiration of his lease, or after the expiration of a notice to quit in the case of a tenancy from year to year. In *Doe* d. *Cundey* v. *Sharpley* (1), the provisions of the Act of Geo. 4, were held not to apply to the determination of a tenancy

(1) 15 M. & W. 558.

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by forfeiture. This is a case of the determination of a lease based upon a forfeiture. For these reasons I think the procedure which the plaintiff seeks to apply is inapplicable.

DAVEY, L.J. If the point in this case now arose for the first time, without any previously existing practice or any decisions bearing upon it, there might be some difficulty in seeing why a plaintiff in such a case as this, who brings himself literally within the words of the rule, should not be entitled to summary judgment in an action in which there is no real defence. But I do not feel myself at liberty to disturb a settled course of practice in such cases. There seems to have been a settled course of practice under the previous Acts relating to the giving of security in actions of ejectment by landlord against tenant, which has been adopted and continued in dealing with actions for recovery of land under Order XIV. The counsel for the plaintiff has argued that this is not, strictly speaking, a case of forfeiture, but according to the form of the lease the term has been determined, not by action or by entry, but by notice to quit; and therefore that the plaintiff comes literally within the words of the rule. I think I have given due weight to this argument, but it seems to me to be too fine. The principle appears to be that the Court will not give a summary judgment in cases where an action for recovery of land is based on a forfeiture; and I think that it would be frittering away that principle if we drew a distinction between such cases and the present case, because a clause, which is in substance a forfeiture clause, in form takes effect by determination of the lease by notice to quit instead of by action or re-entry. I think that in this case the ordinary practice as to cases of forfeiture must be followed, and therefore this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *S. W. Johnson & Son.*
Solicitor for defendant: *J. E. Clay.*

E. L.

[IN THE COURT OF APPEAL.]

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Feb. 5;
March 8.

HARRIS *v.* BEAUCHAMP BROTHERS.

Practice—Execution—Receiver, Appointment of—"Equitable Execution"—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

The Judicature Act, 1873, s. 25, sub-s. 8 does not give jurisdiction to appoint a receiver by way of "equitable execution" in cases where prior to that Act no court had such jurisdiction.

In order to justify the making of an order for the appointment of a receiver at the instance of a judgment creditor, the circumstances of the case must be such as would have enabled the Court of Chancery to make such an order before the Judicature Act.

The Court therefore has no jurisdiction to appoint a receiver merely because, under the circumstances of the case, it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution.

APPEAL from the order of a Divisional Court (Lord Coleridge, C.J., and Collins, J.), affirming an order of Wright, J., at chambers, appointing a receiver as after mentioned.

The facts were as follows :—

The defendants were a firm of two partners carrying on business as retail grocers and provision merchants, one of whom, G. W. Beauchamp, was a minor. The action was brought by the plaintiff against them in their firm name to recover a debt of 189*l.* 5*s.* 1*d.* for goods supplied.

It appeared that the business premises of the firm and stock-in-trade upon such premises had been destroyed by a fire which took place on July 18, 1893. The premises and stock-in-trade were insured by fire policies, the amount payable under which was to be ascertained by arbitration, but had not yet been ascertained. On July 25 the defendants issued a circular referring to the fire and stating in substance that the partnership was dissolved, that they were anxious to give security to the creditors for their debts by charging the same on the insurance moneys, and that they proposed for that purpose to assign such moneys to a trustee for payment of the creditors.

The plaintiff obtained leave to sign judgment in the action under Order XIV., r. 1. On appeal against the order for leave to sign judgment the Divisional Court affirmed such order, but

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added thereto a term to the effect that execution should not issue "against the separate property of the infant partner or against his share, if any, in the partnership profits." On August 2 judgment was signed in the form directed by the order of the Divisional Court. The defendants appealed against such order to the Court of Appeal, which Court on August 10 dismissed the appeal. (1) It was stated during the arguments that on August 10 the senior partner had assigned his interest in the partnership assets to G. W. Beauchamp for the purpose of getting them in and paying the creditors. On August 24 the plaintiff applied for and obtained from Wright, J., an order appointing a receiver of (1.) the policies, (2.) the book debts of the firm, (3.) moneys in any bank to the credit of the firm or of G. W. Beauchamp, being moneys received on account of the firm or the proceeds of sale of any of the firm's effects, and that out of the moneys received the judgment debt, amounting with costs to 200*l.* 10*s.* 5*d.*, should be paid, and that the balance should be paid into Court. In September a receiving order in bankruptcy was made against the defendants' firm, on the petition of other judgment creditors, which however was subsequently discharged by the Court of Appeal. (2) In the same month an application was made to Wright, J., in chambers for an attachment against one Clarke who had been the guardian ad litem of the infant partner, and in whose possession the books of the firm were, for refusing to deliver up such books to the receiver in the action. On the hearing of the application Clarke undertook to deliver up the books, and no order was made for an attachment, but the judge ordered the receiver to pay all moneys received by him into Court to abide further order, and appended a note to his order stating that he appointed the receiver not so much by way of execution as to preserve the funds, &c., for the Court to give effect to their judgment. It was stated in the plaintiff's affidavits that there were book debts due to the defendants' firm from numerous persons amounting to nearly 2000*l.* It was sought to shew by such affidavits that the defendants were throwing obstacles in the way of the creditors, their object being to get in the insurance moneys and the rest of the estate,

(1) See [1893] 2 Q. B. 534. (2) See ante, p. 1.

and divide the same between them on the ground that the infant partner was entitled to half the estate without any liability for debts, and it was stated that, at a meeting of the creditors which was held, the solicitor for the defendants had made a statement shewing that this was the object in view. The solicitor for the defendants in his affidavit denied having made such a statement as alleged. It will be seen from the judgment of the Court that they were of opinion that the alleged obstruction of creditors and intention to make away with the assets were not made out, and it is therefore unnecessary for the purposes of this report to set out the statements made in the affidavits in detail.

On appeal against the order of Wright, J., appointing a receiver the Divisional Court affirmed the order.

Sir H. James, Q.C., and *Herbert Reed, Q.C.*, for the defendants. There was no jurisdiction to make an order for a receiver under the circumstances of this case. It has been decided that s. 25, sub-s. 8, of the Judicature Act, 1873, does not give jurisdiction to appoint a receiver or grant an injunction in cases where a Court of equity could not have done so before the Act: *North London Ry. Co.* v. *Great Northern Ry. Co.* (1); *Manchester and Liverpool District Banking Co.* v. *Parkinson* (2); *Holmes* v. *Millage.* (3) A Court of equity only appointed a receiver by way of what is called "equitable execution" where there was property which would have been subject to execution but for some legal impediment; as, for instance, in the case of an equity of redemption, where the legal estate was not vested in the judgment debtor, and the property could not therefore be reached by an elegit. The amounts due on the policies being unliquidated damages are not the subject-matter of execution at law. In the present case it is not made out that there is not property against which execution can be obtained at law; for instance, there are admittedly book debts to a large amount which can be reached by garnishee proceedings. There is no legal impediment to obtaining execution at law in that way.

(1) 11 Q. B. D. 30. (2) 22 Q. B. D. 173.
(3) [1893] 1 Q. B. 551.

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Channell, Q.C., and *Wedderburn*, for the plaintiff. The jurisdiction of a Court of equity to appoint a receiver was not confined to cases where there was a legal impediment to execution at law. It is submitted that there was jurisdiction to appoint one where there was shewn to be reason to apprehend that the judgment creditor would be defeated by the debtor's making away with his property. The jurisdiction to appoint a receiver given by the Judicature Act is not confined to cases where a Court of equity would have appointed one. It is contended that under that Act a receiver may be appointed where there is a subject-matter of execution which can be more conveniently rendered available to satisfy the judgment debt in that way than by the ordinary mode of execution. *Manchester and Liverpool District Banking Co.* v. *Parkinson* (1) only decides that in general, where there is property available for legal execution, the Court will not under the Judicature Act deem it just and convenient to appoint a receiver; but it does not appear to decide that the jurisdiction to do so is absolutely confined to cases where before that Act a Court of equity had jurisdiction to appoint a receiver; and it seems to be admitted by the Court that there might be special circumstances which would render it "just and convenient" under s. 25, sub-s. 8, of the Judicature Act, 1873, to appoint a receiver. There are such circumstances in this case: first, the fact, which, it is submitted, sufficiently appears from the affidavits, that the defendants are throwing every possible obstacle in the way of the judgment creditor; secondly, the peculiar form of the judgment, restricting the execution as it does; and thirdly, the fact that the defendants are threatening to make away with the assets, which have actually been assigned to the infant partner, as it is suggested, for the purpose of defeating the judgment creditor. The ground of the decision in *Holmes* v. *Millage* (2) was that the subject-matter was not the subject of any mode of execution, whether legal or equitable, being salary not yet earned; and the case therefore is no authority that, where there is a subject-matter which is available to satisfy the judgment debt, the Court cannot under s. 25, sub-s. 8,

(1) 22 Q. B. D. 173. (2) [1893] 1 Q. B. 551.

of the Judicature Act, 1873, appoint a receiver where it appears to be "just and convenient."

As long as the assignment of the assets to the infant partner stands, it is a legal impediment to execution.

The insurance moneys cannot be legally attached in execution as long as the amount is unascertained, being unliquidated damages: see *Randall* v. *Lithgow*. (1) But when the amount is ascertained, they could be attached. Therefore there is a legal impediment as to them.

With regard to the book debts, there are difficulties in the way of attaching them. The defendants were retail grocers, and the debts, though in the aggregate amounting to a large amount, are small debts due from numerous persons. Therefore, garnishee proceedings might have to be taken against several debtors, and it is not the practice at chambers to order attachment of debts under 5*l.*, because the expenses in such a case amount to as much as the debt. It is "just and convenient," therefore, in such a case, to appoint a receiver who can conveniently go round and collect as much as may be necessary to satisfy the judgment debt.

Herbert Reed, Q.C., in reply. The mere fact that there may be practical difficulties in obtaining execution against property legally subject to it, and that the appointment of a receiver would be a more easy and convenient mode of getting at such property, would not have sufficed to give jurisdiction to a Court of equity to appoint a receiver before the Judicature Act, and will not suffice to give jurisdiction under the Act.

Cur. adv. vult.

March 8. The judgment of the Court (Lord Esher, M.R., Lopes, L.J., and Davey, L.J.), was delivered by

DAVEY, L.J. This is an appeal from an order of the Divisional Court refusing an application to set aside an order dated August 24, 1893, and made by Wright, J., appointing a receiver over certain property of the defendants. The order in question was made, by way of what is called "equitable

(1) 12 Q. B. D. 525.

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Davey, L.J.

execution," to enforce a judgment obtained in the action and dated August 2, 1893, against the defendants for 189*l.* 5*s.* 1*d.* debt and 11*l.* 5*s.* 4*d.* costs. The defendants are a firm of Beauchamp Brothers, and it is stated that one of the members of the firm, Gilbert Walter Beauchamp, is an infant. The judgment, as confirmed in this Court (1), is in a peculiar form. It provided that execution should not be issued against the separate property of G. W. Beauchamp, the infant, or against his share (if any) in the partnership profits. It is said that the word "profits" is a mistake, and it should be read as "assets." In our opinion, it is immaterial for the present purpose which is the correct word, as the meaning is perfectly plain that execution may be levied on whatever constitutes the capital stock, or property of the firm or partnership, and it is only the partnership property which is reached by the order under appeal. It further appears that the business premises and certain stock of the firm have been burned, and they have a claim for a large sum on fire policies, the exact amount of which has not yet been adjusted. By the order of August 24, a receiver has been appointed of 1. the policies, meaning apparently the money receivable under the policies; 2. book debts of the firm; 3. moneys in any bank to the credit of the firm or of G. W. Beauchamp, the infant partner, being moneys received on account of the firm or the proceeds of sale of any of the firm's effects; and it is directed that out of the moneys received the judgment debt, amounting with costs, to 200*l.* 10*s.* 5*d.*, be paid, and the balance paid into court. It was stated at the bar that the order has since been explained and varied by Wright, J., in a manner to which I will presently advert.

We have carefully considered the affidavits upon which this order was made, and we think it is difficult to find in them any sufficient grounds to support the order; and we gather from the judgment of the Court below, delivered by Collins, J., that the Court affirmed the order with some hesitation. It is supported as an equitable execution of the judgment. That leads to the question what is meant by "equitable execution," and under what circumstances it ought to be granted. The learned counsel

(1) [1893] 2 Q. B. 534.

for the plaintiff boldly argued, that, if you have got a subject-matter which might be made available for the satisfaction of the judgment debt, you may have a receiver, if it is a better mode of getting it in than the usual mode. In our opinion, this is wrong.

Various modes are provided by common law and statute for enabling a judgment creditor to obtain payment of his debt, and the Rules of Court contain elaborate provisions for giving effect to such modes of enforcing a judgment.

Order XLII., r. 3, provides that "a judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof." And rule 28 of the same order provides that "nothing in this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner, or against any person or property whatsoever." But neither of those rules, while they preserve all existing modes of enforcing judgments, purports to provide any new mode of so doing; and, in our opinion, if any more convenient process is to be established, it ought to be by the Legislature and not by the Court.

We are, therefore, thrown back on the inquiry, What was the jurisdiction in this matter of the Court of Chancery, which is now vested in every branch of the High Court, and in what cases was it exercised? The jurisdiction is thus described in Lord Redesdale's work on Equity Pleading (Mitford's Chancery Pleadings, 4th ed., p. 126): "Courts of Equity will also lend their aid to enforce the judgments of Courts of ordinary jurisdiction; and, therefore, a bill may be brought to obtain the execution or the benefit of an elegit or a fieri facias, when defeated by a prior title, either fraudulent, or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In some cases, where Courts of Equity formerly lent their aid, the legislature has, by express statute, provided for the relief of creditors in the courts of common law; and consequently rendered the exercise of this

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jurisdiction in such cases unnecessary. In any case to procure relief in equity the creditor must shew by his bill that he has proceeded at law to the extent necessary to give him a complete title."

It will be observed that the jurisdiction was exercised only on a bill filed by the judgment creditor or a petition in an existing suit, and was part of the jurisdiction exercised by the Court to remove impediments from the path of a party pursuing his legal remedy, e.g., by injunction to restrain a defendant in ejectment from setting up an outstanding term. It should be added that in a suit by a judgment creditor to impeach an assignment or conveyance as fraudulent upon creditors, the Court would, of course, in a proper case grant a receiver to preserve the property until the hearing, but in such case the order would be ancillary to the principal relief asked. The most common case was where the interest of the debtor in real estate was an equity of redemption which could not be reached by elegit, in which case the Court appointed a receiver, as was elaborately explained by Jessel, M.R., in *Anglo Italian Bank* v. *Davies*. (1) Instances of the exercise of a similar jurisdiction in regard to personal estate are to be found in *Robinson* v. *Wood* (2), and *Watts* v. *Jefferyes* (3), where the debt sought to be attached was payable by the Accountant-General of the Court, and could not, therefore, be reached by the ordinary process: and see *Westhead* v. *Riley*. (4) Very soon after the passing of the Judicature Act it was settled that, as all branches of the Court had jurisdiction, it was not necessary to commence a separate proceeding; but the equitable remedy could be given in the action, in which the judgment had been recovered: *Salt* v. *Cooper*. (5) But that case affords no warrant for saying that the equitable jurisdiction now possessed by all branches of the High Court, and exerciseable in the action, differed from or exceeded the old equitable jurisdiction.

Some laxity, however, appears to have prevailed, and receivership orders would seem to have been made on the ground of greater convenience only, and in many cases ex parte. In some

(1) 9 Ch. D. 275.
(2) 5 Beav. 388.
(3) 3 Mac. & G. 422.
(4) 25 Ch. D. 413.
(5) 16 Ch. D. 544.

cases orders would seem to have been made where the proper proceeding was by application for a charging order under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1. In *Lucas* v. *Harris* (1), the practice of granting such orders ex parte was disapproved in this Court.

We should be sorry to limit by construction the beneficial jurisdiction of the Court to grant an injunction or make an order for a receiver where it is "just or convenient" to do so; but we conceive those well-known words do not confer an arbitrary or unregulated discretion on the Court, and do not authorize the Court to invent new modes of enforcing judgments in substitution for the ordinary modes. See per Jessel, M.R., in *Aslatt* v. *Corporation of Southampton.* (2) In the case of *In re Shephard* (3), the true nature and proper application of what is commonly called "equitable execution" was defined by this Court. In that case, Cotton, L.J. said, "confusion of ideas has arisen from the use of the term 'equitable execution.' The expression tends to error. It has been used by judges, and occurs in some orders, as a short expression indicating that the person who obtains the order gets the same benefit as he would have got from legal execution. But what he gets by the appointment of a receiver is not execution but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law. Until recently nobody ever thought that an order for a receiver would be obtained in aid of a legal judgment, unless there was a hindrance in obtaining execution at law." Fry, L.J., said in that case, "the idea that a receivership order is a form of execution is, in my opinion, erroneous. A receiver was appointed by the Court of Chancery in aid of a judgment at law where the plaintiff shewed that he had sued out the proper writ of execution and was met by certain difficulties arising from the nature of the property, which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for

(1) 18 Q. B. D. 127, at p. 134. (2) 16 Ch. D. 143.
(3) 43 Ch. D. 131.

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a legal debt. Relief by the appointment of a receiver went on the ground that execution could not be had, and, therefore, it was not execution." And see the judgment of Lindley, L.J., in *Holmes* v. *Millage*. (1)

The case of *Manchester and Liverpool District Banking Co.* v. *Parkinson* (2) was referred to in the Court below as shewing that the order might be made under special circumstances. It would be rash and unwise to attempt to define the special circumstances which would justify the making of an order such as that which we have before us. But for reasons which will appear from what has been already said, we think they must be such circumstances as would have enabled the Court of Chancery before the Judicature Act to have interfered by way of injunction or receiver at the suit of the judgment creditor.

Now, what are the special circumstances relied on in the present case. They are: (1.) The obstruction of the defendants; (2.) the form of the judgment; (3.) threats to make away with the property; and it was suggested at the bar that the defendants had made an assignment or conveyance for the purpose of defeating the judgment. With regard to obstruction, the only statement in the affidavit is that the defendants have exercised their right of appealing against the judgment, and it was stated at the bar that they have successfully resisted a receivership order in bankruptcy. These are not, of course, any real grounds. With regard to the form of the judgment, which confines the plaintiff to the assets of the firm, we are unable to see how it places any legal impediment in the way of the plaintiff's taking those assets in execution, though of course questions may arise whether the goods or debts seized or attached are liable to seizure or attachment. Such questions may and do arise in other cases, and the law provides a means for their speedy settlement. The only evidence of a threat to make away with the property is a statement said to have been made at a meeting of creditors by Mr. Harper, the defendants' solicitor, which is denied on oath by Mr. Harper; and we think there is no sufficient evidence of any such intention on which the Court could act. We are, however,

(1) [1893] 1 Q. B. 551. (2) 22 Q. B. D. 173.

far from saying that, if a case were established to the satisfaction of the Court that the defendants threatened and intended "fraudulently" (we use the word advisedly) and for the purpose of delaying and defeating the creditors to make away with the property, it would not justify the interference of the Court. With regard to the alleged assignment, the only evidence before the learned judge was a circular issued by the defendants, in which they announced the dissolution of their firm, and that they proposed to vest or had vested the policy moneys in a trustee for payment of their creditors. This may or may not be fraudulent against the plaintiff, and liable to be set aside in a proper proceeding, in which issue can be taken on its validity in the presence of the proper parties; but it does not in our opinion justify the appointment of a receiver in these terms or in this action or at this stage. There is no evidence before the Court of the execution, contents, or effect of the alleged assignment, and there is no proceeding to impeach it or test its validity. This can only be done either in a separate action, in which no doubt the Court could appoint a receiver till the trial to preserve the property in statu quo, or by means of an interpleader issue. The vice of this order is that in the absence of parties interested and without any definite issue or evidence before it, the Court has prejudged the question (if there be one) by ordering its receiver to take possession of the property and apply it in satisfaction of the judgment debt.

We do not forget that it was stated at the bar that the learned judge, when the matter came before him again in September, explained his previous order in a note, and directed the money to be paid into Court. His note was to the effect that he appointed the receiver, not so much by way of execution as to preserve the assets for the Court to give effect to the rights of the parties interested. We are of opinion that the learned judge had no jurisdiction to make such an order. This is not equitable execution, but administration, which the Court had no jurisdiction to order, at any rate in this action. It was in fact an irregular substitute for a receiving order in bankruptcy.

We are therefore of opinion that the order of August 24, 1893,

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was made improvidently and on insufficient grounds, and ought to be discharged.

Appeal allowed.

Solicitors for plaintiff: *Godfrey & Webb.*
Solicitors for defendants: *Harper & Battcock.*

E. L.

C. A. 1894 *March* 2.

[IN THE COURT OF APPEAL.]

WENDON *v.* LONDON COUNTY COUNCIL.

Metropolis—Management Acts—General Line of Buildings—Work done before establishment of general Building Line—What amounts to a "Building, Structure or Erection"—Metropolis Local Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.

In 1890 the owner of land in the metropolis adjoining a newly-laid-out street deposited with the vestry of the parish plans for the erection of a shop on the side of such street, and in the same year, in accordance with the plans, he constructed the footings for the external walls of two sides of the shop, one side being that adjoining the street, and upon the footings on that side he raised the external wall to a height of twelve feet above the level of the street; he then suspended his building operations. At that date there was no other building on either side of the street. In 1892 he built a row of houses on the same side of the street, but standing ten feet further back from the street than the shop above mentioned. Subsequently he leased the site of the shop to the appellant, who in January, 1893, without obtaining the consent of the London County Council, proceeded to erect the shop in accordance with the plans deposited by his lessor. In March, 1893, the superintending architect of the London County Council decided the general line of buildings on that side of the street to be the main fronts of the above-mentioned row of houses. The appellant was thereupon summoned for having, contrary to the provisions of s. 75 of the Metropolis Local Management Act, 1862, erected a building beyond the general line of buildings in the street without the consent in writing of the London County Council:—

Held (affirming, but on different grounds, the judgment of the Queen's Bench Division), that the wall which had been built before the general building line came into existence was not, in fact, a building, structure, or erection within the meaning of the Act; that the land was therefore at that time vacant land for the purposes of the Act; that the acts of the appellant after the building line came into existence amounted to the erection of a building beyond the general building line; and that an order that he should demolish so much of the building as had been erected by him in advance of such line was rightly made.

Semble (*per* Lord Esher, M.R., and Davey, L.J.), that s. 75 of the Metropolis

Local Management Act, 1862, does not prevent the subsequent completion of a building existing in an unfinished state at the time when the general building line is established.

APPEAL from the judgment of a Divisional Court (Wills and Wright, JJ.), upon a case stated by a metropolitan police magistrate, reported ante, p. 227, where the facts are fully stated.

Channell, Q.C., and *R. C. Glen*, for the appellant. At the time of the creation of the general building line the appellant's predecessor in title, in whose place the appellant stands, had a right to build his house in accordance with the deposited plans. The wall which he built was not a mere garden-wall, but was from its origin a part of the building, or was so intended to be, and there never was any abandonment of the intention to complete the building thus begun. The case must therefore be treated as though the building had been continuous, and the mere fact of a building line coming into existence during the progress of the operations cannot prevent the appellant from finishing the building already begun. It is clear from the judgment of Mellish, L.J., in *Lord Auckland* v. *Westminster Board of Works* (1), that the words "no building, structure, or erection" in s. 75 are to be construed as meaning, no building, structure, or erection built or erected for the first time; and what the appellant did was not to build a building for the first time, but merely to complete an existing building. The cases of *London County Council* v. *Cross* (2) and *Nathan* v. *Metropolitan Board of Works* (3), cited in the Court below, are distinguishable, for in both those cases there was a building line in existence before the building complained of was begun.

[DAVEY, L.J. May it not be a question of fact in each case whether the building complained of was erected before or after the building line came into existence?]

Yes. Secondly, the magistrate's order was bad in directing the demolition of that part only of the building which was erected by the appellant. Sect. 75 only empowers him to order

(1) Law Rep. 7 Ch. 597, at p. 606. (2) 61 L. J. (M.C.) 160.
(3) Ante, p. 230.

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the demolition of such "building or erection, or so much thereof as may be beyond the general line," and in the present case the whole building was beyond the general line, and should have been ordered to be pulled down.

Avory, for the respondents. The order was right, the building having been erected after the building line had come into existence. The case of *Lord Auckland* v. *Westminster Board of Works* (1) is inapplicable to the present, the facts being wholly different; but the judgment of James, L.J., in that case placed a construction on s. 75 which is material—that the section only applies to a new building, structure, or erection built on land which, for the purposes of the Act, is properly described as vacant ground. Accepting this interpretation, the ground on which the appellant's building was erected was, when the building line came into existence, vacant ground for the purposes of the Act. The wall that had been put up was not a building or structure, and the act of the appellant was not the mere completion of an existing structure; what he did was to erect a house for the first time.

[LORD ESHER, M.R. Might the appellant have roofed in the space behind the wall?]

No; that would be to turn into a building that which was not a building: *Clark* v. *Vestry of St. Pancras* (2), followed and amplified in *Ellis* v. *Plumstead Board of Works*. (3) It is really a question of fact whether the building was erected after the coming into existence of the building line, and the facts shew that the appellant commenced the building with his eyes open after the line had been established.

The order was rightly limited to part of the building. It seems clear from the judgment of Lindley, L.J., in *London County Council* v. *Cross* (4), that there may be cases in which such an order might be made; besides, in the present case the original wall was not built in a street, and it is only buildings, &c., built in a street which are dealt with by s. 75; the building erected by the appellant was so erected.

Channell, Q.C., in reply.

(1) Law Rep. 7 Ch. 597.
(2) 34 J. P. 181.
(3) 68 L. T. 291; 57 J. P. 359.
(4) 61 L. J. (M.C.) 160, at p. 168.

LORD ESHER, M.R. I am of opinion that this appeal should be dismissed. The question for us is whether that which was erected after the line of street was defined was an erection within the meaning of the Act of 1862 which could properly be dealt with by the authorities, and that question depends upon the true interpretation of s. 75, within which section, and not within s. 74, the case admittedly falls. The state of things with which we have to deal is this: before the line of the street was defined part of a wall had been built by the appellant's predecessor in title, which for the purposes of the present case is the same as though the appellant himself had built it, and that piece of wall was intended to be the beginning of a house or shop. For two years and a half the building or completion of that wall was discontinued; but, as there was no abandonment, the case must be dealt with as if what was done after the building line became manifest had been done continuously and without any break in the construction of the wall, and we have to say whether that which was so done was a building within the meaning of the section.

Now, I think that we must construe the section in the way laid down by those great lawyers, James and Mellish, L.JJ., and we have to determine whether what was done amounted to the erection of a building within the section upon ground which is to be considered vacant within the meaning of the statute, though it was not actually vacant. Our answer must depend in a great measure upon a question of fact, and upon the proper legal inference to be drawn from existing facts. The wall was in part twelve feet high, in part not so high; it had been built before the building line became manifest, and it was intended to be part of a building within the meaning of the section. The question of fact at once arises, Was that wall as a fact sufficiently advanced to be a building or structure within the meaning of the Act? I think that the section does not prevent a building or structure existing at the time the line of building is defined from being completed, finished, or altered; the section says that a person may not *erect* a building, and, applying the interpretation of James and Mellish, L.JJ., that means that he must not erect it on land which within the meaning of the

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statute is vacant. If that which is on the land when the line of building is made manifest is not a building or structure within the meaning of the Act, it cannot be said after the line is made manifest that the owner is completing or altering a structure which existed at the time the line was made manifest, for there was no such structure at that time. If therefore we come to the conclusion that what existed at that time was not a building or structure within the meaning of the Act, all that was done afterwards was to erect a building or structure within the meaning of the Act after the line had become manifest; it was not altering or completing a structure which already existed, but erecting the whole of it after there was a building line.

Whether the work done before the building line comes into existence amounts to a building or structure is a question of fact to be determined in each particular case as it arises; and if the case comes before the Court, the Court must determine it. In the present case the wall was in one part twelve feet high, elsewhere it was not so high, and it did not extend along the whole length of the building. The question of fact is, Did it amount to a building or structure as it was then? The question of intention is, in my opinion, not very material to the determination of that question, and I think that the work was not so far advanced as that it could be called a building, structure, or erection within the meaning of the Act. It is easy to see that when a warehouse has been built up to the height of two or three floors, but the roof has not been put on, the work done amounts to the erection of a structure or building, though it is not finished, and there is nothing in the Act which says that after the coming into existence of the building line the owner cannot complete that which is already a structure or building. But in my opinion this wall was not, when the building line became manifest, a structure or building within the meaning of the section, and I think that the land was within the meaning of the statute vacant land at that time. If that is so, what was done afterwards was the erection of a building after the building line came into existence. For these reasons, I think that the order of the learned magistrate to demolish so much of the building as was

erected beyond the general line of buildings was right, and that this appeal should be dismissed.

LOPES, L.J. I agree. The facts of this case are very material, and they are shortly these. In 1890 a new street was laid out by the appellant's predecessor in title; at one end of it he commenced to build a house, but all he did was to put in the footings of the walls, and to build twelve feet above the ground on the side next to the street. In 1892 he built a row of houses on the same side of the street, but farther back from the road, and he thereby created a general line of buildings where there was none before. He then leased this piece of ground to the appellant, who built two stories, using the wall and footings left by his predecessor, and the question for us is whether this act of the appellant in raising this building after the establishment of the general building was a violation of s. 75. The material words of the section are, "No building, structure, or erection shall, without the consent of the [London County Council,] be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate;" and the question arises, What was the wall which was erected to the height of twelve feet before the general building line was established? I assume that the wall was erected for the purpose of ultimately forming part of a house, and I ask myself, Was it before the establishment of the general building line a building, structure, or erection erected within the meaning of s. 75 of the Act? I have come to the conclusion that it was not. The judgment of Cockburn, C.J., in *Clark* v. *Vestry of St. Pancras* (1), seems to me to be of great importance, and he was in that case clearly of opinion that the mere raising of a wall was not a building, though the wall might be a building when it was covered over. The point of distinction between the two cases is that there was there no finding of fact that the wall was to form part of a house; but the principle decided in that case, that the raising of a wall is not a building, structure, or erection within the meaning of s. 75, is material to the decision of the present appeal.

The effect of what has been done before the coming into

(1) 34 J. P. 181.

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existence of a general building line must, or at any rate may, be a question of fact. If there were nothing remaining to be done but to put on the roof, it might be held that what had been put up amounted to a building within the meaning of s. 75; but it is obviously a very different thing only to put in the footings and build twelve feet of wall. Before the general building line was established this ground came within the definition of vacant land as defined in *Lord Auckland* v. *Westminster Board of Works* (1), and after that date the appellant continued the building and made the twelve-foot wall into a house which, beyond all question, is a building within s. 75, and which is in advance of the general building line. Having regard to the facts, the sense of the matter is that the *building* was erected after the building line was determined. No doubt some cases under s. 75 may be cases of hardship; but any fear of hardship is mitigated by bearing in mind that the owner had the opportunity of obtaining the consent in writing of the London County Council.

DAVEY, L.J. I am of the same opinion, and will add but a few words. The real question for our determination is whether the building or erection which, by the magistrate's order, is to be removed is a new building, structure, or erection within the meaning of s. 75. Upon the facts found, I think that it must be so regarded, although before the establishment of the general building line it existed in the shape of the footings of the walls, and twelve feet of wall on the land, and notwithstanding that this work had been done with the intention of erecting a shop on the same site. If it is to be so regarded, then it has only the rights of a new house, to use the language of Cotton, L.J., in *Barlow* v. *Kensington Vestry*. (2) I adopt the interpretation which the Master of the Rolls has placed upon the language of the judgments in *Lord Auckland* v. *Westminster Board of Works* (1), and I have his concurrence in adding that in so doing we are only following the interpretation placed upon that language in *Barlow* v. *Kensington Vestry* (2) by Cotton, L.J. It is true that the decision of the Court of Appeal in the last-named case was overruled in the House of Lords, but only on the ground that no

(1) Law Rep. 7 Ch. 597. (2) 27 Ch. D. 362.

general building line had been properly established, and nothing was said in the House of Lords intimating any dissent from the interpretation placed upon s. 75 by Cotton, L.J., following the previous decisions of James and Mellish, L.JJ.

There is, of course, an inconvenience in deciding upon the facts of the particular case, and cases may be put which are very near the line, or are cases of apparent hardship. I agree with my brother Lopes that that is guarded against by the existence of a dispensing power against an excessively rigorous application of the Act—a power the exercise of which the legislature has thought may properly be left to the discretion of the London County Council. I will only add that nothing that we have said is to be taken to imply that where a building exists before the building line is determined, although it exists in an uncompleted state, the mere completion after the line is established of that existing building or structure will bring the case within the operation of s. 75.

Appeal dismissed.

Solicitors for appellant: *Newman, Paynter & Co.*
Solicitor for respondents: *Blaxland.*

W. J. B.

THE EAST LONDON WATERWORKS COMPANY *v.* FOULKES.

1894
March 9.

Waterworks—Rate—House Unoccupied for Part of Quarter—Extent of Liability —Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 70, 71.

By s. 70 of the Waterworks Clauses Act, 1847, the water rates are to be paid in advance by equal quarterly payments on the usual quarter days :—

Held, that where a house, to which water is supplied by a waterworks company, is unoccupied at the beginning of a quarter, and becomes occupied in the course of the quarter, the company are only entitled to demand under the above section so much of the quarter's rate as is proportional to the period during which the house is occupied, even though whilst the house was so unoccupied the company had no notice of the fact, and consequently continued the supply of water.

TRIAL before Wills, J., without a jury.

The defendant was the owner of a number of houses situate at Leytonstone and Stratford, which houses were supplied with

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water by the plaintiffs. The houses were respectively of an annual value not exceeding 20*l.* By a special Act of the plaintiffs it was provided that the owners of all houses not respectively exceeding the annual value of £20 should, during such time as they were supplied with water by the company, be liable to the payment of the rates chargeable in respect thereof instead of the occupiers. The plaintiffs sued the defendant, as owner of the said houses, to recover a sum of 210*l.* 17*s.* for arrears of water rates claimed to be due in respect of water supplied thereto. During certain of the quarters in respect of which the rates were claimed certain of the houses were unoccupied during the whole quarter, others were unoccupied at the commencement of the quarter, but became occupied during the currency of the quarter, while others were occupied at the commencement of the quarter, but were vacated by the tenants before the quarter expired. But in none of such cases was any notice given to the plaintiffs either by the outgoing tenants or by the defendant of their intention to discontinue the use of the water, nor was the water cut off, and the houses in consequence, although unoccupied, were still supplied with water. At the hearing, it was conceded by counsel for the plaintiffs, on the authority of *British Empire Mutual Life Assurance Co.* v. *Southwark and Vauxhall Water Co.* (1), that the plaintiffs were not entitled to charge the rates for any quarter in which the houses were unoccupied during the whole quarter; and, on the other hand, it was conceded by counsel for the defendant that the plaintiffs were entitled to charge for the whole of the quarters in which the houses were occupied at the commencement of the quarter but became vacant during the quarter. The question, however, as to the right of the plaintiffs to charge the rate for the whole of a quarter in which a house was unoccupied at the commencement but became occupied during the quarter was disputed.

Finlay, Q.C., and *R. Bray*, for the plaintiffs. Where a house is occupied during any portion of a quarter, whether such occupation commences at the beginning of the quarter or in the middle, the company are entitled to a whole quarter's rate. No

(1) 59 L. T. (N.S.) 321.

other conclusion can give full effect to the language of s. 70 (1) of the Waterworks Clauses Act, 1847, which provides, first, that the rates shall be paid by "equal quarterly payments"; and, secondly, that such payment shall be made on the regular quarter days, except in the case of the first quarter, when the supply of water is commenced in the middle of the quarter, in which case the first payment is to be made at the date when the water is laid on or agreed to be taken.

Channell, Q.C., and *J. F. Rawlinson*, for the defendant. The mere fact that the water is in supply does not make the owner of an unoccupied house liable. The provision in s. 70 that the rates are to be paid by equal quarterly payments was only meant to apply to cases in which the house was occupied for several quarters. Where the house becomes occupied in the middle of a quarter, the company are only entitled in respect of that quarter to a proportionate part of the rate. If the plaintiffs' contention that occupation during any part of a quarter entitles the company to the whole quarter's rate were correct, s. 71 (2) would be unnecessary.

Finlay, Q.C., in reply. Sect. 71 was necessary, not for the purpose of making the liability to pay the water rate extend up to the end of the quarter, but for the purpose of making the liability cease at that date. The plaintiffs' contention involves no hardship upon the defendant, for if proper notice of the house being empty were given to the plaintiffs they would be entitled to cut off the water, and the cost of reconnecting the

(1) By s. 70 of the Waterworks Clauses Act, 1847: "The rates shall be paid in advance by equal quarterly payments, in England or Ireland at Christmas Day, Lady Day, Midsummer Day, and Michaelmas Day . . . . and the first payment shall be made at the time when the pipe by which the water is supplied is made to communicate with the pipes of the undertakers, or at the time when the agreement to take water from the undertakers is made."

(2) By s. 71: "The occupier of any dwelling-house, or part of a dwelling-house, liable to the payment of any water rate, who shall give notice of his intention to discontinue the use of the water supplied by the undertakers, or who shall remove from his dwelling between any two quarterly days of payment, shall pay the water rate in respect of such dwelling-house, or part of a dwelling-house, for the quarter ending on the quarterly day of payment next after his quitting the same or giving such notice."

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pipes, which would have to be borne by the defendant, would far exceed half a quarter's water rate.

WILLS, J. The question is whether the defendant is bound to pay for the whole quarter when the use of the water has begun in the middle of the quarter, or whether he is only to pay a proportionate part. This particular question does not appear to have been present to the mind of the draughtsman of the Act at the time when he drew it, and it seems to me quite impossible to reconcile the different provisions of the Act which are applicable to it, if those provisions are to be interpreted literally. The guiding principle of the legislation seems to be that a man is to pay for the use of the company's water a sum which is proportionate to the annual value of his house. But then, unfortunately, the Act goes on with a provision which, if read literally, would oblige him to pay, not proportionately to the annual value, but at a very much higher rate. If the contention of the plaintiffs is right, then for an occupation of a week, provided part of it was before the quarter day and part after, the person supplied with water during that period would have to pay half a year's water rates. That seems to me a most unreasonable proposition, and if one portion of the Act has to give way to another portion, the portion to give way should be that which leads to the unreasonable conclusion. The provision in s. 70 of the Waterworks Clauses Act that the rates shall be paid "by equal quarterly payments" may, I think, be read as meaning that they shall be so paid by equal quarterly payments where the house has been occupied for one or more whole quarters, but that where there has been an occupation for only a part of a quarter, then (subject to the provision in s. 71) the payment shall be in the same proportion. Moreover, s. 71 is strong to support the defendant's contention that, except where otherwise expressly provided, the intention of the legislature was that the water should be paid for only so long as the house was occupied and the water used, for if the intention of s. 70 had been that where a house is occupied for only part of a quarter the rate should be paid for the whole quarter, s. 71 would have been wholly superfluous and unnecessary. I am of opinion that

where the occupation commenced in the middle of a quarter the plaintiffs are entitled to recover only so much of that quarter's rate as is proportionate to the length of the occupation.

Judgment accordingly.

Solicitors for plaintiffs: *George Kebbell & Miller.*
Solicitors for defendant: *Pollock & Co.*

J. F. C.

THE QUEEN *v.* BERGER.

1894

March 19, 20.

Criminal Law—Misdemeanor—New Trial—Obstruction of Highway—Conviction—Evidence—Admissibility—Evidence of Reputation—Map of Inclosure Award, whether admissible to prove Boundaries of Ancient Highway.

Where the defendant is found guilty on an indictment, preferred in the Queen's Bench Division, for obstructing a highway, a new trial may be granted on the grounds of misdirection, misreception of evidence, and verdict against evidence.

On the trial of such an indictment the map attached to an old inclosure award, shewing an ancient highway in existence when the award was made, is inadmissible as evidence of reputation to prove the boundaries of the highway at the date of the award against a defendant whose property lies adjacent to the highway, and was not subject to the jurisdiction of the Inclosure Commissioners in making their award.

RULE NISI for a new trial.

The defendant was tried on an indictment, preferred in the Queen's Bench Division, charging him with having obstructed a highway, called the Great North Road, in the parish of Finchley, in the county of Middlesex, by placing a fence and certain houses and buildings thereon.

The prosecutors were the Finchley Local Board of Health. At the trial, before Lawrance, J., and a jury in the Queen's Bench Division on February 12, 1894, the question at issue between the parties was whether or not a strip of land, which the defendant had inclosed by making a fence and putting houses and buildings thereon, formed part of the highway or part of the defendant's property lying near thereto. A considerable body of evidence was given on behalf of the prosecution and the defence respectively. The prosecution sought to establish a continuous user by the public for many years of the strip of

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land as part of the highway; whilst evidence was called for the defendant to establish acts of ownership by him and by his predecessors in title, and other facts, in order to rebut the presumption that there had been any dedication of the strip of land as part of the highway. Amongst other evidence, the prosecution tendered the map attached to an inclosure award made in 1814, in order to shew by such map that at that date the strip of land in question was not inclosed or separated from the highway, but formed part of it, the boundary of the highway on that side, as shewn by the map, being a line of buildings on what was admittedly the property of the defendant's predecessors in title. The award was made by commissioners under an Inclosure Act of 51 Geo. 3, c. xxiii., for the inclosure of certain commons and waste lands in the parish of Finchley. Sect. 46 provided that the award to be made by the commissioners under the authority of the Act, "together with a proper map or plan of the said commons and waste lands thereto annexed," should be delivered to the clerk of the peace for the county of Middlesex, and that the award, or a copy of it attested as therein prescribed, should "from time to time and at all times thereafter be admitted and allowed as legal evidence of the matters and things therein contained in all Courts whatsoever." The strip of land in question was not in any way dealt with by the award. Although the Great North Road was shewn on the map, it was not alleged that the Inclosure Commissioners had any jurisdiction to deal with or define the property of the defendant's predecessors in title, or to set out the limits thereof. It was admitted that such property was not an old inclosure, and that no lands were awarded to the defendant's predecessors in title in respect of it. It appeared that the map had been made by some person having authority to make it under the Inclosure Act, and that the award and map were produced from the proper custody. Objection was taken by the defendant's counsel that the map was not admissible in evidence against the defendant; but this objection was overruled by the learned judge, and the map was accordingly admitted.

The jury having found a general verdict of guilty on the two counts of the indictment, the defendant obtained this rule for a

new trial, on the grounds (amongst others) of misdirection, misreception of evidence, and verdict against evidence.

Philbrick, Q.C., and *A. Macmorran*, for the prosecution, shewed cause. The indictment was for a criminal offence in respect of which, on conviction, the defendant was liable to fine and imprisonment. This Court, therefore, has no jurisdiction to entertain an application for a new trial on the grounds stated in the rule. Pratt's Law of Highways, 13th ed. (Mackenzie and Weir), p. 127, correctly states the rule thus: "This being a criminal proceeding, a new trial will not be granted after acquittal or conviction, either on the ground of misreception of evidence, misdirection, or that the verdict is against evidence; but the Court may stay judgment to give an opportunity for a fresh indictment." So, in Short and Mellor's Crown Office Practice, p. 252, it is stated: "Where, however, the case is strictly a criminal one, and renders the defendant liable to imprisonment upon conviction, as upon an indictment for obstruction to a highway, it it clear that there can be no new trial." *Reg.* v. *Bertrand* (1) and *Reg.* v. *Duncan* (2) support those statements of the rule. It is true that they were cases in which the defendant had been acquitted; but there is no distinction in principle to be drawn in this respect between cases of acquittal and conviction. The only instances in which a new trial has been granted, where there has been a verdict of guilty, have been where the indictment has been for nonfeasance, as for mere non-repair of a highway. It is submitted that there is a clear distinction—which was pointed out by Crompton, J., in *Reg.* v. *Johnson* (3)—between nonfeasance and misfeasance.

[WRIGHT, J. In 1 Chitty's Criminal Law, 2nd ed., p. 654, it is said: "In all cases of misdemeanor after a conviction there is no doubt that the superior Courts may grant a new trial in order to fulfil the purposes of substantial justice." In Archbold's Criminal Pleading, 21st ed., p. 207, there is a statement to the same effect with respect to cases in which the indictment has been preferred in the Queen's Bench Division or has been removed into that Court. So, also, in 2 Hawkins P. C., c. 4, s. 12,

(1) Law Rep. 1 P. C. 520. (2) 7 Q. B. D. 198.
(3) 2 E. & E. 613.

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and 3 Bl. Com., p. 387. In *Reg.* v. *Whitehouse* (1) a new trial was granted after a conviction for misdemeanor.]

The point was not taken in *Reg.* v. *Whitehouse.* (1) Where it is desired to dispute the verdict on the ground that points of law have been wrongly decided against the defendant, the Court for the Consideration of Crown Cases Reserved is the only tribunal to which he can have recourse. As to the ground, stated in the rule, of misreception of evidence, it is submitted that the map attached to the inclosure award was rightly admitted in evidence by the learned judge at the trial. It was admissible as evidence of reputation, having been made by a person having authority and competent to make it, and coming from the proper custody: *Hammond* v. *Bradstreet* (2); *Freeman* v. *Read.* (3)

[CAVE, J. The cases shew that it would be admissible to prove by reputation matters of public interest—as that the road in question was a highway—but not to prove particular facts as to the boundaries of the highway. The rule is stated in *Reg.* v. *Bliss.* (4)]

[It is unnecessary for the purposes of this report to set forth the arguments for the prosecution upon the other grounds on which the rule was obtained.]

Crump, Q.C., and *Macaskie*, for the defendant, were not called upon to argue in support of the rule.

CAVE, J. This is an application for a new trial in the matter of an indictment, found in this Court, against the defendant for obstructing a highway. At the trial the defendant was found guilty. It was first contended on behalf of the prosecutors that the application for a new trial could not be made on the grounds stated in the rule; but it is laid down in text-books of undoubted authority that such an application can be made on those grounds, and counsel for the prosecutors were unable to point to any case in which the law so stated has been doubted. It has, no doubt, been laid down that the application cannot be made where a verdict of not guilty has been found on the indictment; but that ruling is founded upon the principle that a man who has once been put

(1) Dears. 1.
(2) 10 Ex. 390.
(3) 4 B. & S. 174.
(4) 7 A. & E. 550.

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in peril upon a criminal charge cannot again be put in peril upon the same charge. Where, however, the application for a new trial comes after conviction, that doctrine in favour of accused persons does not apply. I am, therefore, of opinion that it is open to the defence to make this application upon the grounds on which it has been made. I think the learned judge at the trial went too far in admitting in evidence the map attached to the inclosure award of 1814. Without that map the evidence, I think, went strongly in the defendant's favour. [The learned judge referred to the evidence.] The map, or a large drawing of a portion of it, was produced by the prosecutors for the purpose of shewing that the land in question was not inclosed in 1814; and the judge admitted it in evidence for that purpose. I am of opinion that it was inadmissible for that purpose. Inasmuch as the map was made by one of the public it could not have been excluded if it had been tendered as evidence on the point whether the Great North Road was or was not a highway; but that point was not in dispute. The authorities establish that, although hearsay evidence is good evidence of reputation in matters of public interest, it is not good evidence of particular facts from which an inference of fact may be drawn in respect of individual rights. In the present case the map would be good evidence of reputation that there was a public road in the direction shewn on the map, if the contest were whether the land in question was a highway or not; but it was not good evidence of the boundaries of the highway. The production of the map must have produced considerable effect upon the minds of the jury; and I am of opinion that in admitting it in evidence the learned judge went beyond what the cases warranted, and that there must therefore be a new trial.

WRIGHT, J. I am of the same opinion, and on the same grounds.

Rule absolute for a new trial.

Solicitors for prosecution: *Stevens & Parker.*
Solicitor for defendant: *V. I. Chamberlain.*

W. A.

1894
Feb. 28.

IN RE THE FERNDALE INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED.

Company—Winding-up—Registered Industrial Society—Jurisdiction of County Court—Industrial and Provident Societies Act, 1876 (39 & 40 *Vict. c.* 45), *s.* 17—*Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *ss.* 58, 59—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

The enactments from time to time in force for the winding up of companies in the Chancery Division of the High Court apply to the case of the winding up of a registered Industrial Society, which was pending in a county court at the time of the passing of the Industrial and Provident Societies Act, 1893, and which has not been transferred to the High Court under the provisions of s. 59 of that Act.

APPEAL from the decision of Grantham, J., at chambers.

The Ferndale Industrial Co-operative Society, Limited, was registered under the Industrial Societies Act, 1876. In August, 1893, a petition for the winding up of the society was presented in the county court of Glamorganshire, and in October, 1893, an application was made to the judge under s. 10 of the Companies (Winding-up) Act, 1890, for an examination into the conduct of a certain Mr. Thomas and another person, alleged to have been officers of the society. The application was adjourned till February, 1894, when the county court judge held that he had jurisdiction to entertain the application, and made an order for such examination. Mr. Thomas thereupon applied in chambers for a writ of prohibition to prohibit the judge of the county court and the liquidator of the society from further proceeding with any matter connected with the society against him. Grantham, J., refused the application, and Mr. Thomas appealed.

A. J. David, for the appellant. There was no jurisdiction in the county court to entertain such an application. By s. 59 of the Industrial and Provident Societies Act, 1893, which was passed on September 12, 1893, and came into operation on January 1, 1894, the pending proceedings in the winding up of any society under the Act are transferred to the High Court.

The Companies (Winding-up) Act, 1890, did not apply to the winding up of industrial societies in the county court: *In re London and Suburban Bank* (1); *In re Real Estates Co.* (2) By s. 17 of the Industrial and Provident Societies Act, 1876, the winding up of such a society was to take place in the county court. That Act has been repealed by the Industrial and Provident Societies Act, 1893, which by s. 58 enacts that the winding up of a society is to take place subject to the provisions of the Companies Acts, 1862–1890, but says nothing as to the Court in which such winding-up is to take place. Therefore, by s. 1 of the Act of 1890, where the capital of the company or society exceeds 10,000*l.*, the Court under whose supervision the winding-up is conducted is to be the High Court, and where the capital is less than 10,000*l.* the Court is to be the county court. In the case of this society the capital exceeded 10,000*l.*, and therefore the only Court having jurisdiction is the High Court. Further, s. 10 of the Companies (Winding-up) Act, 1890, only refers to the winding up of "a company under the Companies Acts," and that phrase would not include an industrial society.

W. D. Benson, for the respondents. The county court had jurisdiction to entertain this application quite apart from any question of the capital of the society. The winding-up petition was presented in August, 1893, under s. 17 of the Industrial and Provident Societies Act of 1876, and all proceedings were taken under that section and were necessarily in the county court. Sect. 17 incorporated the provisions of the Companies Act, 1862, which, by s. 165, gave the Court having jurisdiction in the winding-up the same powers as were afterwards given by s. 10 of the Companies (Winding-up) Act, 1890. That Act repealed and re-enacted s. 165 of the Companies Act, 1862, and did not therefore take away the jurisdiction of the county court to entertain such applications as that in question. Order XLI., r. 9, of the County Court Rules, 1892, recognises the jurisdiction of the county courts to entertain such applications. The decision in *In re London and Suburban Bank* (1) was, that a society registered under the Industrial Societies Act, 1876, could not be wound up in the High Court; but, as was held in *In re Portsea Island*

(1) [1892] 1 Ch. 604. (2) [1893] 1 Ch. 398.

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Building Society (1), the practice laid down from time to time by the Companies Acts, 1862 to 1890, regulating the winding up of companies in the High Court, is equally applicable to the winding up of industrial and building societies in the county court. Sect. 59 of the Industrial and Provident Societies Act, 1893, is in terms permissive and not compulsory, and only transfers to the High Court proceedings pending when the Act came into force, "on application made by or on behalf of the registrar with the consent of the Treasury." No such application was made in the case of this winding-up.

David, replied.

MATHEW, J. It is clear that the proceedings at the time that they were taken were properly instituted in the county court under the Act of 1876, for, as was decided by North, J., in *In re London and Suburban Bank* (2), such a society could not then be wound up under the Companies (Winding-up) Act, 1890. The Act of 1876 substituted the county court for the Superior Court as the tribunal for winding up industrial and provident societies; but every statute which was subsequently passed relating to the procedure in winding-up applies to winding-up in the county court as well as to winding-up in the Superior Court. That is recognised by Order XLI., r. 9, of the County Court Rules, 1892.

My brother Williams, in the case of *In re Portsea Island Building Society* (1), adopts the same principle with regard to building societies. To my mind, it is quite clear that the provisions contained in s. 10 of the Act of 1890 apply to a winding-up in a county court just as they do to a winding-up in the High Court. That being so, no question arises as to the capital of this society, and the only difficulty left is that raised by the argument on s. 59 of the Act of 1893. It is said that that section provides for every winding-up pending in a county court at the time of the passing of the Act—in other words, that it takes away the jurisdiction of the county court in all such cases. I cannot agree with that construction. Sect. 58 provides that a registered society may be dissolved by a resolution for the winding-up thereof made as is directed in regard to companies by the Com-

(1) [1893] 3 Ch. 205. (2) [1892] 1 Ch. 604.

panies Acts, 1862 and 1890, the provisions of which shall apply. That is, therefore, a section of general application. Then s. 59 is permissive only, and applies to the winding up of a registered society in which proceedings are pending at the time of the passing of the Act, and it provides that such a winding-up may, on application made by or on behalf of the registrar and with the consent of the Treasury, be transferred to the High Court. Unless such application is made and such consent is given, it is clear that the winding-up must be dealt with under s. 58. The appeal must therefore be dismissed.

CAVE, J. I am of the same opinion. I admit that at first I had some little difficulty in following the course of legislation; but, when I once understood the case as presented, there did not seem to be any real difficulties in the way.

By the Act of 1876, s. 17, industrial and provident societies may be dissolved "by an order to wind up the society, or a resolution for the winding-up thereof, made as is directed in regard to companies by the Companies Act, 1862, the provisions whereof shall apply to any such order or resolution, except that the Court having jurisdiction in the winding-up shall be the county court." That being so, it is clear that after the passing of that Act these societies could not be wound up in the High Court, but only in the county court. The provisions then existing as to the winding up of companies by the Companies Act of 1862 were made applicable; but the winding-up was to take place in the county court. Then came the Companies (Winding-up) Act, 1890; and it is contended that that Act alters the case. The answer to that is, I think, given by my brother Vaughan Williams in the case of *In re Portsea Island Building Society* (1), and in the comments which he makes on *Andrew* v. *Swansea Cambrian Benefit Building Society* (2), where Denman, J., and Lindley, L.J., decided that under s. 32 of the Building Societies Act, 1874—an Act which for the purposes of this case is practically the same as the Industrial and Provident Societies Act, 1876—the county court was substituted for the Court of Chancery, and that it did in effect, though not expressly, put building societies under

(1) [1893] 3 Ch. 205. (2) 50 L. J. (C.P.) 428; 44 L. T. (N.S.) 106.

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the Acts of 1862 and 1867 by virtue of the clauses in the Acts relating to industrial companies, although the Companies Acts of 1862 and 1867 were not expressly incorporated in the Building Societies Act. If that is true with regard to the Building Societies Act, 1874, it is equally true with regard to the Industrial and Provident Societies Act, 1876—that is to say, the latter Act still gave exclusive jurisdiction to the county court over the winding up of these societies. That was so held by my brother North in *In re London and Suburban Bank.* (1) But the jurisdiction being retained in the county court, it must be exercised in accordance with the practice under the Companies Acts. That being so, s. 10 of the Act of 1890 applies; and the county court judge was bound or was at liberty—according to circumstances—to apply the practice there laid down to the winding up of this society. Where the application was compulsory he was bound to apply the practice; where it was discretionary he had the same discretion which the Court of Chancery would have had in applying it. Although the practice of the Court was altered by the Act of 1890, yet the tribunal remained the county court and the county court only. Then came the Industrial and Provident Societies Act, 1893, which makes certain provisions which it is now unnecessary to go into. Sect. 59, which is the only one we need now discuss, provides that, "Any proceedings in the winding up of a registered society which at the passing of this Act are pending in any county court, may, on application made by or on behalf of the registrar with the consent of the Treasury, be transferred to the High Court." Now, in this case the winding-up was undoubtedly a winding up of a registered society which at the passing of the Act of 1893 was pending in the county court. No doubt, therefore, it might be transferred to the High Court under s. 59; but it can only be transferred on application made by or on behalf of the registrar and with the consent of the Treasury. So far from the section operating as an actual transfer, it requires these conditions precedent without which a transfer cannot be made. No such conditions have here been fulfilled; and no order of transfer has been made. Consequently, the case

(1) [1892] 1 Ch. 604.

properly remains in the county court, and the county court judge has jurisdiction to make this order. If any objection is taken to anything done by him in the course of such winding-up, the application to set him right must be made in the usual way. There is no question as to his jurisdiction here. He alone has jurisdiction to wind up the society so long as no order for the transfer of the winding-up is made under s. 59; and he is entitled to conduct the winding-up in such manner as he may think fit. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *W. H. Martin & Co., for David & Evans, Cardiff.*

Solicitors for respondents: *Bell, Brodrick, & Gray, for Symons & Son, Pontypridd.*

A. P. P. K.

THE SINGER MANUFACTURING COMPANY *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

1894
Feb. 5.

Railway—Cloak Room—Lien for Charges—Goods deposited by Bailee.

The bailee of a sewing machine under a hire and purchase agreement deposited it at the cloak room of a railway station. After the determination of the bailment, the owners of the sewing machine sought to recover it from the railway company:—

Held, that the railway company had a lien on the sewing machine against the owners for the payment of the cloak-room charges.

APPEAL from the decision of the judge of the Southwark County Court.

The plaintiffs by an agreement let to one Woodman a sewing machine, Woodman undertaking to pay to them a rent of 1*s.* 6*d.* per week payable weekly in advance, and it was agreed that at any time during the hire Woodman might become the purchaser of the machine by payment of the price, and that in such case credit should be given for all payments previously made under the agreement. Unless and until a purchase was effected, the machine was to continue the sole property of the plaintiffs, and Woodman was to remain bailee only of it.

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In May, 1893, Woodman deposited the sewing machine in the cloak room belonging to the defendants at Waterloo Station, and received a ticket on which was printed among other conditions, "Articles deposited in the cloak rooms for more than 48 hours will be charged 1*d.* extra for each package per diem for the first calendar month, and 2*d.* per week or part of a week for the second and third calendar months. . . . Articles left in the cloak rooms for twelve months are liable to be sold, and the company will not hold itself responsible to account for the proceeds."

Woodman subsequently made default in the payment of the weekly rent, and in October, 1893, he forwarded the cloak-room ticket to the plaintiffs. The defendants refused to deliver the sewing machine to the plaintiffs until they were paid 4*s.*, which was admitted to be the amount of their charges in accordance with the condition indorsed on the cloak-room ticket. The plaintiffs then brought this action to recover the machine, and the defendants counter-claimed for the 4*s.*

The county court judge held that the defendants had a lien on the sewing machine in respect of these charges, and gave judgment for them on claim and counter-claim. He, however, gave leave to appeal, and the plaintiffs appealed.

Cluer, and *W. Russell*, for the plaintiffs. The depositary of chattels has no right of lien as against the true owner. The only exceptions to this rule are in the cases of innkeepers, who have a lien on all goods left with them in that character, and of carriers, who have a lien on all goods entrusted to them for carriage. It is not suggested that this sewing machine was entrusted to the defendants as common carriers. No doubt as against the depositor the defendants would be entitled to retain the machine until these charges for warehousing were paid; but it cannot be contended that the plaintiffs gave him authority to deposit the machine with the defendants so as to make them responsible to the defendants for these warehouse charges. It is clear, therefore, that the counter-claim cannot be sustained, and consequently, since the defendants have no right to recover these warehouse charges from the plaintiffs, they have no lien for those

charges as against them: *Castellain* v. *Thompson* (1); *Hiscox* v. *Greenwood* (2); *Hollis* v. *Claridge*. (3)

Acland, for the defendants. It is admitted that the counterclaim cannot be sustained since no express authority to the depositor from the plaintiffs can be shewn, and it must, therefore, be treated as withdrawn. The defendants, however, have a lien on the machine for the payment of these charges. They received it as warehousemen, not as carriers, and as such they have a lien upon it: *Rex* v. *Humphery* (4); *Moet* v. *Pickering*. (5) The principle on which innkeepers and carriers have a lien on goods entrusted to them for their charges as against all the world is that they are bound to receive such goods for storage or carriage respectively: *Naylor* v. *Mangles*. (6) The defendants are also bound to provide cloak rooms at railway stations, and to receive goods into them, and, therefore, the same principle applies. By s. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), every railway company shall according to its powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic on their railway. Traffic is defined by s. 1 to include passengers and their luggage and goods, and a cloak room for the reception of the luggage and goods of passengers is such a reasonable facility as a railway company are bound to supply: *South Eastern Ry. Co.* v. *Railway Commissioners*. (7) The right of warehousemen to a lien for their charges was recognised in *De Rothschild* v. *Morrison, Kekewich & Co.* (8), which shews that if the defendants in this case had interpleaded they would have been entitled to these charges.

Cluer, in reply. *De Rothschild* v. *Morrison, Kekewich & Co.* (8) was a decision on Order LVII., r. 15, and did not refer to the question of lien. The lien of carriers and innkeepers is not dependent on their obligation to receive goods: *Threlfall* v. *Borwick*. (9).

(1) 13 C. B. (N.S.) 105.
(2) 4 Esp. 174.
(3) 4 Taunt. 807.
(4) M'Cl. & Y. 173.
(5) 8 Ch. D. 372.
(6) 1 Esp. 109.
(7) 6 Q. B. D. 586.
(8) 24 Q. B. D. 750.
(9) Law Rep. 10 Q. B. 210.

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MATHEW, J. I think that this appeal must be dismissed.

The material facts are these. One Woodman, the hirer of a sewing machine, deposited it at the cloak room belonging to the defendants at Waterloo Station. The charges for which the defendants now claim a lien on the machine were incurred in respect of the deposit of the article there. The hirer, it would appear, after a time made up his mind not to release the article, and gave notice to the owners where it was. It was held by Woodman under a hire-purchase agreement, and, at the time this notice was given, a considerable amount of instalments remained unpaid. Thereupon the plaintiffs demanded the possession of the sewing machine from the defendants, and the defendants claimed a lien upon it for their charges for the time during which the article had remained in their cloak room. Now, it could not be disputed that the hirer was entitled, while he was in possession of this article, to carry it by train and to incur such charges in respect of it as a passenger by train does incur. Whatever the origin of the rule, it is not necessary to discuss now; but it is clear law that a carrier would have on the article so carried a lien for the charges incurred in respect of its carriage. The sole question now is whether the same principle applies to the charges incurred in respect of its safe custody in the cloak room.

The history of the cloak room at railway stations is supplied by the Railway and Canal Traffic Act, 1854. There it is enacted that a railway company shall afford reasonable facilities for receiving, forwarding, and delivering traffic. One of the most reasonable of such facilities is the cloak room at railway stations, which has been long established in accordance with that Act of Parliament. The cloak room at Waterloo Station existed under that Act of Parliament, and it is said the principle that applies to the contract of carriage applies to this cloak room, which is provided by the company as part of the reasonable facilities for the traffic on the line. It seems to me that that argument is a sound one, and that the same principle applies. The lien which the defendants had as carriers they had also as owners of the cloak room, and they were entitled, in my opinion, to have payment of their charges in respect of the machine before delivery to the plaintiffs.

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That was the opinion of the county court judge. I see no reason to differ from it, and the appeal must be dismissed.

COLLINS, J. I am of the same opinion. I think the sewing machine in this case must be taken to be deposited in the cloak room just in the same way and subject to the same rights as if it were entrusted to a carrier for the purpose of carriage. I think, that having regard to modern decisions and the rising standard of convenience to which railway companies are obliged to conform, the cloak room is now to be regarded simply as one of the necessary and reasonable facilities incident to the carriage of passengers and their baggage. The company are common carriers of passengers' luggage, and if they carried this sewing machine they would be common carriers of this sewing machine, and would have a lien upon it against all the world in respect of the cost of carrying it. I do not see why they should not equally have a lien for receiving it and warehousing it in their cloak room. The same principle lies at the root of both. They are under an obligation now to give reasonable facilities for the receipt and safe custody of baggage, and it was in the performance of that obligation that they received this sewing machine. Therefore, on that ground it seems to me the lien is good, not only against the person depositing it, but against the owner. I think in this case the lien may also be rested on another ground; and that is, that the person who deposited this machine was, as between himself and the owner of it, entitled to the possession of it at the time he deposited it. He was entitled to it under a contract of hire, which gave him the right to use it, I presume, for all reasonable purposes incident to such a contract, and among them, I take it, he acquired the right to take the machine with him if he travelled, and to deposit it in a cloak room if he required to do so. In the course of that reasonable user of the machine, and before the contract of bailment was determined, he gave rights to the railway company in respect of the custody of it. I think those rights must be good against the owners of the machine, who had not determined the hire-purchase agreement at the time that those rights were acquired by the railway company. If the owners subsequently determined that agreement,

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they must determine it subject to the rights which had been acquired, that is, subject to the lien of the defendants for their charges.

I think, therefore, that on both those grounds the judgment of the county court judge is right, and the appeal ought to be dismissed.

Appeal dismissed; leave to appeal given.

Solicitor for plaintiffs: *Wansbrough.*

Solicitors for defendants: *Birchams & Co.*

A. P. P. K.

C. A.

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Feb. 22.

[IN THE COURT OF APPEAL.]

BAKER *v.* CARRICK.

Defamation—Libel—Privileged Occasion—Solicitor—Letter written in ordinary course of Duty to Client.

A solicitor, acting on behalf of his client, gave written notice to an auctioneer not to part with the proceeds of the sale of certain goods, intrusted to him for sale, on the ground that the owner of the goods had committed an act of bankruptcy upon which an order in bankruptcy might be made against him. In an action by the owner of the goods against the solicitor for libel:—

Held, that the occasion was privileged, since the solicitor was acting in the ordinary course of his duty to his client, and the occasion would have been privileged had the client himself written the letter.

Blackham v. *Pugh* (2 C. B. 611) approved.

APPLICATION of the defendant for a new trial, or that judgment should be entered for the defendant.

The action was for libel contained in a notice sent by the defendant, a solicitor, to an auctioneer who had been intrusted with the sale of certain furniture and goods of the plaintiff. The notice was in the following terms: "As solicitors for William Henry Copley and Arthur William Clark, of Wisbech, surgeons, we give you notice that an action has been commenced in the High Court of Justice, Queen's Bench Division, against John Thomas Baker, late of Leverington, near Wisbech, implement-manufacturer, for the recovery of the sum of 82*l.* 6*s.* due to the said William Henry Copley and Arthur William Clark, and that the said John Thomas Baker has committed an act of bankruptcy, upon which an order in bankruptcy may be made

against him, and we give you further notice that you are not to part with or pay over to any person pending the trial of the said action, or of any proceedings in bankruptcy which may be instituted against the said John Thomas Baker, any moneys which you may receive as the proceeds of sale of the goods and effects of the said John Thomas Baker, advertised to be sold by you on the 2nd day of October next, and herein fail not at your peril. Dated the 29th day of September, 1893. (Signed.) Welchman & Carrick, solicitors, Wisbech." The John Thomas Baker referred to in this notice was the plaintiff in the present action, and the defendant was a member of the firm of Welchman & Carrick. The innuendo set out in the statement of claim was that the defendant meant that the plaintiff was insolvent and had been guilty of an act of bankruptcy, and had absconded from England in order to defeat and delay his creditors, and was attempting to defraud his creditors by selling his property and obtaining the proceeds thereof before the same could be secured and obtained possession of on behalf of his creditors.

The defence set out that Messrs. Welchman & Carrick were consulted as solicitors by Messrs. Copley & Clark, with a view to recovering the amount due to them from the plaintiff. It stated that both of these firms reasonably and bonâ fide believed that the conduct of the plaintiff was detrimental to the chance of the debt being satisfied, and that the plaintiff was insolvent, and had departed out of England or otherwise absented himself in order to defeat and delay his creditors, and that thereupon, on the instructions of Messrs. Copley & Clark, and as their solicitors, Messrs. Welchman & Carrick wrote and published the letters complained of, which were fair and impartial statements of the existing facts, and were written and sent bonâ fide in the honest defence of their clients' interest, and without any malice towards the plaintiff, and by reason of the occasions on which they were written the words complained of were privileged.

The action was tried before Cave, J., who held that the occasion was privileged, but on the evidence left it to the jury to say if there was express malice. The jury found a verdict for the plaintiff, and judgment was entered accordingly.

The defendant appealed.

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Murphy, Q.C., and *Horace Brown*, for the defendant. There was no evidence of express malice to go to the jury, and the occasion was privileged. The statement complained of was made by the defendant in defence of his clients' interest. In *Blackham* v. *Pugh* (1) the client was sued in respect of a similar letter written on his behalf by his solicitors, and the occasion was held to be privileged. The privilege extends to the case of the solicitor provided he believed the statements to be true and in the absence of malice. [They cited *Stuart* v. *Bell*. (2)]

Kemp, Q.C., and *McIntyre*, for the plaintiff. The occasion was not privileged. In *Blackham* v. *Pugh* (1) the persons sued were themselves interested in making the statement. It was not within the scope of the defendant's employment to make defamatory statements of the plaintiff. The defendant was employed to conduct an action, and his writing this letter was no step in that action. It may be that if he had recovered judgment for his clients, and had endeavoured to secure payment of it by some such step as he took in this case, the occasion would have been privileged; but it would be a dangerous doctrine to hold that a solicitor is entitled to make such defamatory statements merely because his client has a claim that may or may not be well-founded against a third party. Further, there was evidence of express malice.

LORD ESHER, M.R. This is an action for a libel. The alleged libel is that, as property of the plaintiff was about to be put up for sale by auction, the defendant, acting as solicitor for clients, wrote to the auctioneer desiring him not to part with the produce of the sale, as the plaintiff had committed an act of bankruptcy on which he might be adjudicated bankrupt.

The first matter in dispute is whether as regards the defendant the occasion was privileged. He was acting for clients who alleged that they were creditors of the plaintiff, and he was instructed by his clients to take the necessary steps towards securing payment of the alleged debt, and to see that its recovery was not put in jeopardy. That seems to me to be within the ordinary duties of a solicitor. It is suggested that the solicitor

(1) 2 C. B. 611; 15 L. J. (C.P.) 290. (2) [1891] 2 Q. B. 341.

was only authorized to act for his client in the conduct of the action, and would only be protected in respect of such matters. I think, however, that at all events nowadays the duties of a solicitor go beyond that, and that it is part of his ordinary duty to see that nothing occurs which will affect his client's claim. If so, and if the occasion was one to which privilege would have attached had the clients themselves done that which the defendant did, it is also privileged in the case of a solicitor acting for his clients.

The next question is whether the privilege has been destroyed. [His Lordship examined the evidence, and continued:—] In my opinion there is no evidence of malice, and the learned judge ought to have directed a verdict for the defendant. The appeal must therefore be allowed, and judgment entered for the defendant.

LOPES, L.J. I am of opinion that the learned judge who tried this case was right in holding that the occasion was privileged. Looking at the decision in *Blackham* v. *Pugh* (1), it is clear that if the statements in the alleged libel had been made by the clients the occasion would have been privileged, and the question arises whether the privilege attaches where the solicitor is sued in respect of statements made by him on behalf of his client. It is the duty of a solicitor to do all that he can to protect the interests of his client, and in my opinion he stands in the same position with regard to privilege as that in which his client would stand in the case of a similar action against him.

I am also of opinion that there was no evidence to go to the jury of anything that would take away the privilege, and that the jury ought to have been directed to find a verdict for the defendant.

DAVEY, L.J. I am of the same opinion. The case raises two points: first, whether the occasion on which the words which are said to be libellous were uttered was privileged; and, second, whether there was any evidence of express malice to go to the jury.

(1) 2 C. B. 611; 15 L. J. (C.P.) 290.

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It is not disputed that if the words complained of had been used by the clients, the occasion would have been privileged; but it is said that, having been used by a solicitor in a matter in which his clients had employed him, no question of privilege arises. No authority has been cited in support of the view that such a distinction exists; and it appears plain to me that a solicitor acting for his principal is bound to do the best he can in the interest of his principal, and is entitled to the benefit of any privilege that would have arisen in the case of the client if he were himself conducting the matter.

I am also of opinion that there was no evidence of malice to go to the jury, and that judgment should have been directed for the defendant.

Appeal allowed.

Solicitors for plaintiff: *Meredith, Roberts, & Mills, for Arthur Smith, Wisbech.*

Solicitors for defendant: *Smiles, Ollard, & Yates, for Welchman & Carrick, Wisbech.*

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[IN THE COURT OF APPEAL.]

BOXSIUS *v.* GOBLET FRÈRES AND OTHERS.

Defamation—Libel—Privileged Occasion—Solicitor acting in discharge of his Duty to his Client—Publication—Letter dictated to Clerk—Letter copied by Clerk.

A solicitor, acting on behalf of his client, wrote and sent to the plaintiff a letter containing defamatory statements regarding her. The letter was dictated to a clerk in the office, and was copied into the letter-book by another clerk. In an action against the solicitor for libel:—

Held, that the occasion was privileged, since the communication if made by the solicitor direct to the plaintiff would have been privileged, and the publication to his clerks was necessary and usual in the discharge of his duty to his client, and was made in the interest of the client.

Pullman v. *Hill & Co.* ([1891] 1 Q. B. 524) distinguished.

APPEAL by the defendants from the judgment of Lawrance, J., on the trial of the case with a jury.

The defendants were Messrs. Goblet Frères, a firm of wine merchants carrying on business in London, and Messrs. Wrensted & Sharp, solicitors. A Mrs. Buderus being indebted to

Messrs. Goblet Frères for wine sold for which she had not paid, the latter put the matter in the hands of their co-defendants, with instructions to endeavour to find Mrs. Buderus and recover the amount due.

Acting on information that the plaintiff and Mrs. Buderus were identical, Messrs. Wrensted & Sharp wrote the plaintiff a letter containing defamatory statements and demanding payment of the debt. Their letter was dictated to and written by a clerk in their office, and, after being signed by the firm, it was handed to another clerk in the office for the purpose of its being copied by him into the letter-book, and it was accordingly so copied. The plaintiff brought an action for libel. The jury found a verdict for 50*l.* against the defendants, but negatived malice on their part. Judgment was directed to be entered for the plaintiff.

The defendants appealed.

Montague Lush, and *Ronald McNeill*, for the defendants. There was no evidence of publication, and as between the solicitors and their clerks the occasion was privileged. A solicitor employed by a client to redress some wrong may be obliged to write defamatory statements, as, for instance, in laying a case before counsel or preparing a brief. It is his duty to his client to do this in the way that most conduces to his client's interest, and dictating to a clerk and having copies made by a clerk is a reasonable and necessary course of business, and is the ordinary mode of performing the duty to the client. This distinguishes the case from that of a merchant, and *Pullman* v. *Hill & Co.* (1) does not apply. A company, with a duty to communicate a report of auditors to their shareholders, may adopt the reasonable course of having it printed without losing privilege: *Lawless* v. *Anglo-Egyptian Cotton Co.* (2); because there is no other way of carrying out their duty, and the same principle applies to this case, for no solicitor could carry out by his own manual work all the business of his office. In *Taylor* v. *Hawkins* (3), it was held, that the presence of a third person who was called in by a master

(1) [1891] 1 Q. B. 524. (2) Law Rep. 4 Q. B. 262.
(3) 16 Q. B. 308.

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about to dismiss a servant did not take away privilege from the words used by the master, because it was material to the master's interest that a third person should be present. The communication was made in discharge of a private duty, and was fairly warranted by a reasonable exigency, and honestly made, and is therefore privileged: *Henwood* v. *Harrison* (1); *Toogood* v. *Spyring*. (2)

Blake Odgers, Q.C., and *Forman*, for the plaintiff. *Pullman* v. *Hill & Co.* (3) is in point. No good ground for distinction exists between the case of a merchant seeking to recover money due to him and a solicitor seeking to recover money for a client. In either case, if defamatory statements are made to third parties, they are made at the peril of the person making them. Neither the occasion nor the communication was privileged. Further, a man may on a privileged occasion write something to which privilege will not attach. The unprivileged part may be separated from the rest: *Cooke* v. *Wildes*. (4) There was no ground for making any charge against the purchaser of the wine, whether that was the plaintiff or some other person, and no privilege attached to that part of the communication. Further, no duty or interest has been shewn to or in the clerks which entitled the defendants to make the communication to them.

LORD ESHER, M.R. In the case of *Pullman* v. *Hill & Co.* (3) this Court held that if a merchant dictates to a clerk a libellous statement about a customer, which that clerk takes down and gives to another clerk in the office to copy, that is a publication to the clerks, and the occasion of such publication is not privileged. We so held on the ground that it does not fall within the ordinary business of a merchant to write such defamatory statements, and that if he does so it is not reasonably necessary, as he is doing a thing not in the ordinary course of his business, that he should cause the statement to be copied by a clerk in his office. The question here arises in the case of a solicitor instructed by a client to obtain payment of a bill, and to press the person who is charged with payment of the bill to the extent

(1) Law Rep. 7 C. P. 606.
(2) 1 C. M. & R. 181.
(3) [1891] 1 Q. B. 524.
(4) 5 E. & B. 328; 24 L. J. (Q.B.) 367.

of asserting that he has been trying to evade payment by at the least a shabby trick and possibly by a criminal action. The first point taken is that that is not a matter within the ordinary business of a solicitor. This is an argument which a few days ago we overruled in another case (1), where it was said that the business of a solicitor was to conduct actions; but the Court pointed out that it was also part of the ordinary business of a solicitor to endeavour to secure the money due to his client by taking steps not necessarily arising in an action. In the present case the solicitors intended to try and obtain payment by a threat of legal proceedings; and the Court takes it upon itself to say that it is part of the ordinary business of a solicitor so to act on the instructions and in the interest of his clients. In the case to which I have referred, we held that if what a solicitor writes on the instructions of his client would, if written by the client, have been written on a privileged occasion, the occasion is also privileged so far as the solicitor is concerned. That would cover this case, for if the clients had written this letter the occasion would have been privileged.

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Then it is said that the solicitors cannot claim privilege as between themselves and the type-writing clerk who took down the letter and the copying clerk who copied it into the letter-book. Such an argument requires consideration; but it seems to me to come to this. It is the duty of the solicitor to write and send this letter, and it is his duty to do that in the ordinary and reasonable way. The duties of a solicitor are not to one client only, but to all his clients, and he has to take measures to perform them with due diligence, and according to the necessary and reasonable method of conducting business in a solicitor's office. If a solicitor is instructed to write defamatory matter on a privileged occasion on behalf of a client, he must do this business as he does other business of the office, in the ordinary way, and that involves his having the communication taken down or copied by a clerk in his office, and copied into the letter-book. It is necessary to keep a record of the transaction, one reason being that there may be a check on the bill of costs. Such a case seems to me to be distinguishable from that of a

(1) See *Baker* v. *Carrick* (ante, p. 838).

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merchant who is writing a libel out of the course of his ordinary business, who, if he has the letter copied by a clerk, does this at his own risk. A solicitor, on the other hand, cannot otherwise perform his duty to his client, and it would be contrary to good sense to say that such a course is unjustifiable. Where what the solicitor does would be done as between himself and the person to whom he is writing, on a privileged occasion, because the occasion would be privileged if the client were himself writing, giving a clerk a letter to copy is also an act done on a privileged occasion, and the solicitor is not liable unless malice is shewn. Malice has been negatived in this case, and that being so the defendant is entitled to judgment. The appeal will therefore be allowed.

LOPES, L.J. I am of the same opinion. Two questions have been raised in this case—whether there was any evidence of publication, and whether the occasion was privileged. On the first point, it seems to me clear that there was evidence of publication by communicating the letter to the clerks. The second point is more important and more difficult. It is impossible to define in a general way what would or would not be a privileged occasion, or to say what social or moral duties, or what kind or amount of duty is necessary to make an occasion privileged. We must be content to deal with the case that is before us, and in this case it appears to me that the rule may be thus stated. If a communication made by a solicitor to a third party is reasonably necessary and usual in the discharge of his duty to his client, and in the interest of the client, the occasion is privileged. In the present case, if the communication had been made direct to the plaintiff it would have been made on a privileged occasion; and though not so made, but made to a clerk in the office, the occasion was also, in my opinion, privileged. It was reasonably necessary that the solicitor should make such a communication; it was usual to do so in the course of business, and it was in the interest of the client that it should be made. The decision in *Pullman* v. *Hill & Co.* (1) was pressed upon us; but, to my mind, that case is distinguishable. The

(1) [1891] 1 Q. B. 524.

ground of the decision was, that it was not the usual course in a merchant's business to write letters containing defamatory statements and to communicate them to a clerk in the office. I adhere to what I said in that case, as to there being neither a duty nor an interest in a merchant to make such a communication as was there made. The case of a solicitor seems to me to be entirely different. The business of a solicitor's office could not be carried on unless it were communicated to the clerks in the office, and it is common knowledge that such is the usual course. If, then, the occasion was privileged, the plaintiff could not succeed in this action unless he gave evidence of express malice, and the existence of express malice has been negatived by the jury, and the defendants are entitled to judgment.

DAVEY, L.J. I am of the same opinion. I think that *Pullman* v. *Hill & Co.* (1) is distinguishable on the grounds that have been already stated, and that the decision to which we have come is justified by earlier authorities.

Appeal allowed.

Solicitors for plaintiff: *Skipper & Tucker.*
Solicitors for defendants: *Wrensted & Sharp.*

(1) [1891] 1 Q. B. 524.

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ADULTERATION—*continued.*
On December 23 a parcel of lard was consigned to the respondent by the said manufacturers and delivered to him under the said contract. The respondent subsequently sold a portion of such parcel to the appellant as and for lard. Upon analysis it turned out to be adulterated. The respondent had sold it bonâ fide and in the same state as it was in when he bought it. On an information against the respondent for having, contrary to the provisions of the Sale of Food and Drugs Act, 1875, sold the lard not being of the nature, substance and quality demanded by the appellant:—*Held*, that the contract of December 17 contained a sufficient written warranty of purity in respect of the specific parcel consigned on December 23 to satisfy s. 25 of the Act, and that the respondent was entitled to be discharged from the prosecution.—*Harris* v. *May* (12 Q. B. D. 97) distinguished. LAIDLAW *v.* WILSON - 74

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BANKRUPTCY—*Act of Bankruptcy—Bankruptcy Notice—Receiving Order—Partnership Firm—Infant Partner—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 5, 9, 110, 115—*Bankruptcy Rules*, 1886, *rr.* 260, 262, 264.] The Bankruptcy Act, 1883, and the general rules made pursuant to the Act, do not authorize the making of a receiving

BANKRUPTCY—*continued.*
order against a partnership firm of which one of the partners is an infant. IN RE BEAUCHAMP BROTHERS. EX PARTE G. W. BEAUCHAMP C. A. 1

2. —— *Act of Bankruptcy—Notice of Intention to suspend Payment—Payment with Notice of Act of Bankruptcy—Solicitor's Costs—Accountant's Charges for Statement of Affairs—Trustee's Title—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 41, 43, 44.] On August 15, 1892, the debtors, having consulted their solicitors, posted a circular to their creditors, stating that certain matters had placed them in "financial difficulties which makes it desirable for us to consult with our creditors as to our position. We are having our books examined and a statement prepared by" a firm of chartered accountants, "and, as soon as this is complete, we propose writing you to a meeting of our creditors." On September 5 a meeting of the creditors was held, at which the statement of affairs prepared by the accountants was submitted. On September 17 a receiving order was made against the debtors. Between August 15 and September 17 the accountants received considerable sums on behalf of the debtors, out of which they paid the solicitors 130*l.* on account of costs, and retained 100*l.* in respect of their own charges in preparing the statement of affairs:—*Held*, that the circular of August 15 was an act of bankruptcy, and that both the 130*l.* and 100*l.* must be repaid to the trustee in bankruptcy, as having been payments made with notice of an act of bankruptcy.—As a general rule a trustee in bankruptcy may, in the exercise of his discretion, adopt and pay for services rendered to a bankrupt after notice of an act of bankruptcy, where such services have clearly resulted in a benefit or profit to the bankrupt's estate commensurate with the services rendered, but he must be very strict in the application of the rule. IN RE SIMONSON. EX PARTE BALL 433

3. —— *Appeal — Practice — Appeal from County Court—Sending Notice of Appeal to Registrar—Irregularity—Discretion to extend Time—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 104 (*d*), 105 (4), 143—*Bankruptcy Rules*, 1886 *and* 1890, *r.* 132.] In an appeal from an order in bankruptcy made by a county court, the Court appealed to ought not, where no special circumstances are shewn, to extend the time for complying with rule 132 of the Bankruptcy Rules, 1886 and 1890, which provides that "upon entering an appeal a copy of the notice of appeal shall forthwith be sent by the appellant to the registrar of the Court appealed from"; nor ought the omission to comply with the rule to be treated as an irregularity which can be cured. IN RE VITORIA. EX PARTE SPANISH CORPORATION - C. A. 259

4. —— *Appeal—Time for Appealing—"Perfecting" of Order — Bankruptcy Rules*, 1886, *rr.* 109, 130.] By the Bankruptcy Rules, 1886, r. 109: "Every order for payment of money and costs, or either of them, shall be sealed, and be signed by a registrar, and shall be forthwith filed with the proceedings." By r. 130, no appeal to the Court of Appeal from any order of the Court is to be brought after the expiration of twenty-one days. "The said period shall be calculated from the time at which the order is signed, entered, or otherwise perfected" . . . .: **BANKRUPTCY**—*continued.*
—*Held*, that an order is "perfected" within r. 130 when it is signed by the registrar, and that the time for appealing against it runs from the date of the signature.—It is not necessary to "perfect" an order that it should be filed with the proceedings to which it relates. IN RE HELSBY. EX PARTE THE TRUSTEE - C.A. 742

5. —— *Assets—Money paid to Solicitor—Defence on Criminal Charge—Agreement for Payment of a Lump Sum—Right to retain for Services rendered after Knowledge of Act of Bankruptcy.*] A solicitor made an agreement in writing with a client who was charged with murder, by which, in consideration of a lump sum paid, the solicitor agreed to conduct the defence and provide for the necessary expenses. Some days after the money had been paid under the agreement the client committed an act of bankruptcy, of which the solicitor had notice on the following day, and a receiving order was afterwards made. The solicitor conducted the defence in accordance with the agreement.—On an application by the trustee in bankruptcy of the client for an order for payment to him of the money which the solicitor had received under the agreement:—*Held*, that the agreement was valid and binding, and the solicitor was entitled, as against the trustee, to retain the money which he had received under it. *In re Pollitt, Ex parte Minor* ([1893] 1 Q. B. 175, 455), distinguished. IN RE CHARLWOOD. EX PARTE MASTERS - - 643

6. —— *Assets—Partnership—Bankruptcy of one Partner—Bankrupt continuing Business—Personal Skill—Profits—Mixed Fund—After-acquired Property—Title of Trustee in Bankruptcy—The Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 53.] The bankrupt, at the commencement of his bankruptcy, was practising as a dental surgeon in partnership with B. He had previously mortgaged his share of the profits of the partnership, and the mortgagee had obtained the appointment of a receiver under his mortgage deed. After the commencement of his bankruptcy, the bankrupt continued to carry on the practice with B. upon the terms of the partnership deed so far as they were applicable, and his share of the profits was paid to the receiver, but was claimed by the trustee in bankruptcy:—*Held*, that, although the profits of the practice arose in great part from the exercise by the bankrupt of his personal skill, yet, as from the commencement of the bankruptcy, the trustee was entitled to his share of the profits.—*Ex parte Benwell* (14 Q. B. D. 301) discussed.—Where the personal earnings of an undischarged bankrupt are received by him under a contract periodically by way of salary or income, and are more than sufficient for the maintenance of himself and his family, the Court has jurisdiction, under s. 53 of the Bankruptcy Act, 1883, to direct a part of such earnings to be set apart for the benefit of the creditors. IN RE ROGERS. EX PARTE COLLINS - - 425

7. —— *Disqualifications of Bankrupt—Bankruptcy before Act creating Disqualification—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 32.] By the 32nd section of the Bankruptcy Act, 1883, "Where a debtor is adjudged bankrupt," he shall be subject to certain disqualifications therein

BANKRUPTCY—*continued.*

specified:—*Held* (by Lopes and Davey, L.JJ., Lord Esher, M.R., dissenting, reversing the decision of the Queen's Bench Division), that the section has not a retrospective operation, and therefore the disqualifications created by it do not attach to a person made a bankrupt before the passing of the Act. IN RE SCHOOL BOARD ELECTION FOR PARISH OF PULBOROUGH. BOURKE *v.* NUTT - - - - - C. A. 725

8. —— *Partnership—Separate Estates—Proof by solvent Partner for separate Debt against separate Estate of insolvent Partner—Rule in Ex parte Topping* (4 *D. J. & S.* 551)]. Where a partnership is insolvent, and a proof is tendered by a solvent partner against the separate estate of his insolvent partner in respect of a separate debt, it is no objection to such proof that the dividend to be received from the insolvent separate estate will swell the surplus that will eventually go from the solvent partner's estate to pay the joint debts of the partnership.—*Lacey* v. *Hill* (Law Rep. 8 Ch. 441) discussed. IN RE HEAD. EX PARTE HEAD - - - - - 638

9. —— *Practice—Consolidation of Petitions—Members of same Partnership—Dissolution of Partnership—Separate Adjudications against late Partners—The Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 112.] Where a partnership has been dissolved, and afterwards separate receiving orders are made against the late partners, and there are joint assets and liabilities still in existence, the Court has jurisdiction to consolidate the proceedings under the separate receiving orders. IN RE ABBOTT - - - - - 442

10. —— *Practice—Security for Costs—Jurisdiction—Discretion—Foreign Creditor—Appeal against Rejection of Proof—Bankruptcy Acts*, 1869 (32 *&* 33 *Vict. c.* 71); 1883 (46 *&* 47 *Vict. c.* 52)—*Bankruptcy Rules*, 1886 *and* 1890, *rr.* 131, 148.] In bankruptcy proceedings governed by the Bankruptcy Act, 1869, and the rules made under it, where a foreign creditor resident abroad appeals against the rejection of his proof by the trustee, the Court ought not now as a matter of course to exercise its discretion by ordering the creditor to give security for the costs of his appeal. The order ought only to be made in peculiar or extreme cases.—*In re Vanderhaege, Ex parte Izard* (20 Q. B. D. 146) discussed. IN RE SEMENZA. EX PARTE PAGET - - - - C. A. 15

11. —— *Proof—Alimony—Arrears accrued after Receiving Order.*] Arrears of alimony payable by a debtor to his wife under an order of the Divorce Division of the High Court of Justice, which become due after a receiving order has been made against the debtor, cannot be proved for by the wife in the bankruptcy of the debtor. IN RE HAWKINS. EX PARTE HAWKINS - 25

12. —— *Proof—Interest on Mortgage—Transfer of Estates of Mortgagor and Mortgagee—Claim to prove for Arrears of Interest.*] A mortgagor assigned his equity of redemption, and the estate of the two mortgagees was transferred, so that it vested in one of them alone. The assignee of the equity of redemption continued to pay interest on the mortgage, and when sued for arrears suffered judgment by default He afterwards was

BANKRUPTCY—*continued.*

adjudged bankrupt, and the transferee of the mortgage claimed to prove against his estate for further arrears of interest. The original mortgagor had absconded:—*Held*, that there was no privity of contract between the assignee of the equity of redemption and the transferee of the mortgage, and no personal liability on the part of the assignee of the equity of redemption to pay interest, and the proof could not be allowed. IN RE ERRINGTON. EX PARTE MASON - - 11

13. —— *Secured Creditor—Interest above 5 per Cent.—Assessed Value of Security allocated in Discharge of Interest—Proof for Balance of Principal—The Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 23—*The Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *Sched. II., rr.* 9, 11.] The 23rd section of the Bankruptcy Act, 1890—which provides that where a debt has been proved upon a debtor's estate with interest, such interest shall for the purposes of dividend be calculated at a rate not exceeding 5 per cent. per annum—does not prevent a secured creditor, who has realized or assessed the value of his security, from allocating such value in discharge of the interest, even although such interest is at a higher rate than 5 per cent. per annum, and proving for the principal or balance of principal due to him. IN RE FOX & JACOBS. EX PARTE DISCOUNT BANKING COMPANY OF ENGLAND AND WALES - 438

14. —— *Small Bankruptcy—Summary Administration—Other Remedy against Property of Debtor—Leave to issue Execution—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 122, *sub-s.* 5.] Where an order has been made under s. 122 of the Bankruptcy Act, 1883, for the administration of the estate of a debtor, the county court has no power, under sub-s. 5 of that section, to give leave to a creditor to issue execution against the property of the debtor. IN RE FRANK - - 9

BEERHOUSE — Licensing Acts — Renewal of licence — Application by person other than the licensed person - - 401
See LICENSING ACTS. 3.

—— Licensing Acts—Beerhouse licensed before May, 1869 — House pulled down for public purpose—Transfer of licence to new house - - - - 83
See LICENSING ACTS.

BETTING—Conviction for keeping room for betting—Validity of conviction though no deposit received - - - 169
See GAMING.

BILL OF LADING — Freight—Liability from receipt of goods under bill of lading—Consignee—Lien—Warehousing cargo—Deposit - - - - 483
See SHIP.

BILL OF SALE—*Bankruptcy—Second Bill of Sale in Substitution of First—Payment of Principal and Interest by Instalments—Form—Validity—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *Sched.*] In January, 1892, a bill of sale was executed to secure the repayment of 200*l.* with interest as therein mentioned, and the grantor covenanted to pay the principal and interest by weekly payments of 2*l.* 6*s.* 2*d.* until the whole

BILL OF SALE—*continued.*

should be paid, the first payment to be made on January 25.—In December, 1892, the grantor was adjudicated bankrupt.—In January, 1893, the grantor gave the grantee, who did not know of the bankruptcy, another bill of sale over the goods assigned by the first bill of sale in substitution for such bill of sale:—*Held*, first, that under the circumstances the second bill of sale did not operate as a surrender or cancellation of the first bill of sale; and, secondly, that the first bill of sale was not void under the Bills of Sale Act, 1882, by reason of interest as well as principal being included in the instalments, or of the instalments being spread over an indefinite period.—*Goldstrom* v. *Tallerman* (18 Q. B. D. 1) discussed. IN RE BARGEN. EX PARTE HASLUCK [444

2. —— *Construction of Covenants—Covenant for Payment of Interest annually on amount of Loan—Payment of Instalments reducing amount of Loan—Production of Receipt for Rent, Rates, and Taxes—Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.] A bill of sale, given to secure money lent, contained a covenant by the grantor to pay the principal sum by equal yearly payments until the whole of the principal sum and interest was fully paid, and also a covenant to pay interest "on the said sum" at a given rate per annum, payable quarterly. The deed also contained a covenant to produce, on demand in writing, the last receipts for rent, rates, and taxes, followed by a proviso that the chattels should not be liable to seizure for any cause other than those specified in s. 7 of the Bills of Sale Act, 1882, which were set out in the deed:—*Held*, that the covenant as to payment of interest must be construed to refer to interest on the amount of principal due from time to time:—*Held*, also, that the covenant to produce receipts must be read with the qualification contained in sub-s. 4 of s. 7 of the Act, that the goods could only be seized if the failure to produce the receipts should be without reasonable excuse. WEARDALE COAL AND IRON COMPANY *v.* C. W. HODSON. A. E. HODSON, CLAIMANT **C. A. 598**

3. —— *Operation—Payment by Instalments—Power to seize—Default in Payment of one Instalment—Right to seize whole of Property—Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.] A bill of sale made the amount secured, and interest, payable by monthly instalments, but there was no express provision entitling the grantee to seize the whole of the goods on default in payment of one instalment. An instalment being in arrear, the grantee, after demand of payment, seized the goods. A receiving order was shortly afterwards made against the grantor, and the official receiver claimed the goods, which were sold by arrangement, the proceeds to abide the order of the Court.—A county court judge having refused to order that the proceeds of the sale should be paid to the grantee:—*Held*, on appeal, that the seizure was rightful, and the grantee in consequence of the default in payment of one instalment became entitled to possession of the whole of the goods, and therefore an order for payment to him of the proceeds of the sale must be made.—*Lumley* v. *Simmons* (34 Ch. D. 698) explained.—*Myers* v. *Elliott* (16 Q. B. D. 526) distinguished. IN RE WOOD. EX PARTE WOOLFE - - - - - **605**

BILL OF SALE—*continued.*

4. —— *Term for Maintenance of Security—Covenant to replace Chattels damaged or worn out—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 6, 9—*Form in Schedule.*] A bill of sale, by which furniture in a dwelling-house specifically described in the schedule to the bill of sale was assigned as security for a debt, contained a covenant by the grantor that, so long as any money should remain owing on the security of the bill of sale, he would not remove any of the said chattels from the said dwelling-house without the previous consent of the grantee, except for necessary repairs, and would replace any articles damaged or worn out with any others of equal value to be included in the security:—*Held*, that such a covenant might be inserted in the bill of sale as being "for the maintenance of the security," and therefore did not constitute a deviation from the form in the schedule to the Bills of Sale Act, 1882. *Thomas* v. *Kelly* (13 App. Cas. 506) distinguished. SEED *v.* BRADLEY [C. A. 319

5. —— *Validity—Registration—Unregistered Mortgage forming Part of Contract—Condition—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 3.] A husband and wife assigned by bill of sale chattels in their dwelling-house to the claimant, to secure the payment of 300*l.* with simple interest payable by instalments. By a contemporaneous deed the wife mortgaged her reversionary interest under a will to the claimant to secure the payment of a like sum with compound interest, payable by instalments on the same days as those mentioned in the bill of sale. The bill of sale was duly registered, but the mortgage was not. Both securities were for the same debt and were given as part of the same transaction:—*Held*, that the agreement in the mortgage to pay compound interest was a condition that ought to have been written on the same paper as the bill of sale before registration; and that the bill of sale was void under the Bills of Sale Act, 1878, s. 10, sub-s. 3.—In considering whether a defeasance or condition is within the above-mentioned sub-section, it makes no difference whether it is in favour of the grantor or the grantee.—Dictum of James, L.J., in *Ex parte Collins* (Law Rep. 10 Ch. 372), disapproved.—*Counsell* v. *London and Westminster Loan and Discount Co.* (19 Q. B. D. 512) followed. EDWARDS *v.* MARCUS. TOWNEND, CLAIMANT - **C. A. 587**

BOILER—"*Used exclusively for Domestic Purposes*"—*Boiler Explosions Act*, 1882 (45 & 46 *Vict. c.* 22), *s.* 4—*Boiler Explosions Act*, 1890 (53 & 54 *Vict. c.* 35), *s.* 2.] A boiler used to heat offices or business premises upon which the owner does not reside, and also to supply warm water for the purpose of cleaning the offices and for the household purposes of a resident caretaker, is within the exception in s. 4 of the Boiler Explosions Act, 1882, and s. 2 of the Boiler Explosions Act, 1890, which except from the operation of those Acts boilers "used exclusively for domestic purposes." SMITH *v.* MÜLLER - - - - **192**

BOROUGH—Vote—Description of qualification—Amendment of claim - - 579
See PARLIAMENT.

—— Vote—Parliament—Occupation of rateable dwelling-house not included in rate 268
See PARLIAMENT. 2.

—— Vote—Service of notice of objection—"Ordinary course of post" - - 583
See PARLIAMENT. 4.

BROKER—Right to recover commission—Stock Exchange—Omission to send contract note to principal - - - 114
See STOCK EXCHANGE.

BUILDING LINE — Metropolis — Management Acts—General line of buildings - 227
See METROPOLIS. 3.

BUILDING SOCIETY—*Deposits—Rule as to Withdrawal—"Available Balance in Hand insufficient to pay all the Depositors wishing to Withdraw"—Payment in Rotation according to Priority of Notices—Suspension of Right to bring Action to recover Deposit.*] The rules of a building society provided, in the case of depositors who had given the prescribed notice to withdraw, that "if the available balance in hand shall be at any time insufficient to pay all the depositors wishing to withdraw, they shall be paid in rotation, according to the priority of their notices." A depositor gave notice of withdrawal, and his deposit not being repaid he brought an action to recover it:—*Held*, by Lord Esher, M.R., and Lopes, L.J., Kay, L.J., doubting, that the fact that the available balance was insufficient to pay the depositors who had given prior notice to withdraw was an answer to the action. BRETT *v.* MONARCH INVESTMENT BUILDING SOCIETY - C. A. 367

CAB—Negligence of driver—Liability of proprietor - - - - 292
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CASES—*Barnes* v. *Rider* (62 L. J. (M.C.) 25) disapproved - - - 544
See ADULTERATION. 4.

—— *Benwell, Ex parte* (14 Q. B. D. 301) discussed - - - - 425
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—— *Blackham* v. *Pugh* (2 C. B. 611) approved
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—— *Bond* v. *Evans* (21 Q. B. D. 249) explained
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—— *Bonnard* v. *Perryman* ([1891] 2 Ch. 269) considered - - - - 671
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—— *Bridges* v. *Garrett* (Law Rep. 5 C. P. 451) distinguished - - - 272
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—— *Burt* v. *Gray* ([1891] 2 Q. B. 98) distinguished - - - - 472
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—— *Capital and Counties Bank, In re* (61 L. T. (N.S.) 516) distinguished - - 351
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—— *Childs* v. *Cox* (20 Q. B. D. 290) overruled
See PARLIAMENT. 3, 4. [265, 583

—— *Collins, Ex parte* (Law Rep. 10 Ch. 372) disapproved - - - - 587
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—— *Counsell* v. *London and Westminster Loan and Discount Co.* (19 Q. B. D. 512) followed - - - - 587
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—— *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* ([1892] 1 Ch. 415) followed - - - 713
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—— *Eldridge* v. *Stacey* (15 C. B. (N.S.) 458) approved - - - - 119
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—— *Fechter* v. *Montgomery* (33 Beav. 22) distinguished - - - - 125
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—— *Foskett* v. *Kaufman* (16 Q. B. D. 279) followed - - - - 579
See PARLIAMENT.

—— *Goldstrom* v. *Tallerman* (18 Q. B. D. 1) discussed - - - - 444
See BILL OF SALE.

—— *Harris* v. *May* (12 Q. B. D. 97) distinguished - - - - 74
See ADULTERATION. 5.

—— *Hill* v. *Thomas* ([1893] 2 Q. B. 333) followed - - - - 37
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—— *Kent* v. *Worthing Local Board* (10 Q. B. D. 118) overruled - - - 332
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—— *King* v. *London Improved Cab Co.* (23 Q. B. D. 281) considered - - 292
See NEGLIGENCE.

—— —— v. *Spurr* (8 Q. B. D. 104) overruled
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—— *Lacey* v. *Hill* (Law Rep. 8 Ch. 441) discussed - - - - 638
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—— *Lewis, In re, Ex parte Munro* (1 Q. B. D. 724) disapproved - - - 462
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—— —— v. *Arnold* (Law Rep. 10 Q. B. 245) overruled - - - - 349
See LOCAL GOVERNMENT. 2.

—— *Lumley* v. *Simmons* (34 Ch. D. 698) explained - - - - 605
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—— *Myers* v. *Elliott* (16 Q. B. D. 526) distinguished - - - - 605
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—— *Pollitt, In re, Ex parte Minor* ([1893] 1 Q. B. 455) distinguished - - - 643
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—— *Price* v. *Jones* ([1892] 2 Q. B. 428) discussed *See* LICENSING ACTS. 3. [401

—— *Pullman* v. *Hill & Co.* ([1891] 1 Q. B. 524) distinguished - - - 842
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—— *Reg.* v. *Grant* (14 Q. B. 43) distinguished *See* FRIENDLY SOCIETY. [107

—— —— v. *Liverpool (Justices of)* (11 Q. B. D. 638) followed - - - 401
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—— *Sanders* v. *Davis* (15 Q. B. D. 218) followed *See* MORTGAGE. [713

—— *Sandford* v. *Clarke* (21 Q. B. D. 398) discussed - - - - 164
See NUISANCE.

—— *Scott* v. *Buckley* (16 L. T. (N.S.) 573) questioned - - - - 119
See LANDLORD AND TENANT. 2.

—— *Somerset* v. *Hart* (12 Q. B. D. 360) approved and followed - - - 574
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—— *Thomas* v. *Kelly* (13 App. Cas. 506) distinguished - - - - 319
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—— *Vanderhaege, In re, Ex parte Izard* (20 Q. B. D. 146) discussed - - 15
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—— *Wendon* v. *London County Council* ([1894] 1 Q. B. 227) affirmed - - 812
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CHAMPERTY—Solicitor—Bill of costs—Taxation - - - - - 747
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CHARTERPARTY—Default in loading full cargo—Damages — Deduction in respect of freight earned by shipowner - 773
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—— Lump freight—Cesser clause - - 612
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—— Option of charterer as to port of discharge—Unloading delayed by strike at port to which vessel ordered - - 179
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—— Restraints of princes and rulers—Demurrage—Customary mode of loading - 174
See SHIP. 5.

COMPANY—*Amalgamation—Sale of Undertaking—Call—Ultrà Vires—Death of Shareholder—Executors—Notice—Address.*] A limited company was empowered by its memorandum of association to sell its undertaking for shares or securities of any other similar company, or for any other consideration. The company sold their undertaking, and in accordance with one of the terms of the sale called up their unpaid capital and paid the amount to the purchasing company:—*Held*, that the call was not ultrà vires.—The memorandum

COMPANY—*continued.*

and articles of association of a limited company empowered the company to make calls, fourteen days' notice to be given of any such call, and to serve the notice upon any member of the company either personally or through the post by letter addressed to such member at his registered address. No provision was made as to the service of notice upon the representatives of a deceased member. After the death of a member, the company made a call upon his shares, and gave notice thereof through the post by a letter addressed to him, which did not reach his executors (who did not know that he had been a member), and was returned to the company marked "Gone away":—*Held*, that under the circumstances the call had been properly made, and that there had been sufficient notice of the call, and that the executors, upon being informed that the testator was a member of the company and of the making of the call, were liable to pay such call out of his assets. —*Per* Davey, L.J.: A deceased member of a limited company remains a member of the company, for the purposes of the articles of association, so long as his name remains on the register without notice to the company of his death. NEW ZEALAND GOLD EXTRACTION COMPANY (NEWBERY-VAUTIN PROCESS) *v.* PEACOCK - C. A. 622

2. —— *Winding-up — Registered Industrial Society—Jurisdiction of County Court—Industrial and Provident Societies Act*, 1876 (39 & 40 *Vict. c.* 45), *s.* 17—*Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *ss.* 58, 59—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.] The enactments from time to time in force for the winding up of companies in the Chancery Division of the High Court apply to the case of the winding up of a registered Industrial Society, which was pending in a county court at the time of the passing of the Industrial and Provident Societies Act, 1893, and which has not been transferred to the High Court under the provisions of s. 59 of that Act. IN RE FERNDALE INDUSTRIAL CO-OPERATIVE SOCIETY - 828

—— Action for libel — Statement affecting business reputation — Special damage, absence of - - - - 133
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COMPENSATION—Lands Clauses Acts—Damage from working of railway — Enlarging ventilating shaft - - - - 384
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COSTS—Costs of former trial to abide "result" of new trial—Recovery of one farthing damages in action of tort—Refusal of certificate for costs - - - 666
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—— Forfeiture — Relief — Liability of underlessee for costs of lessor's solicitor and surveyor - - - - 472
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—— Prohibition—Rule absolute without pleadings - - - - - 453
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—— Solicitor—Bill of costs—Taxation—Agreement in writing - - - 462
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COSTS, SECURITY FOR—Mayor's Court—Appeal
See MAYOR'S COURT. [236

COUNTY COURT—*Appeal—Death of Parties pending Appeal—Jurisdiction of High Court to add Legal Representatives.*] Where, on an appeal being brought from a county court, one of the parties dies after the entry of the appeal, the High Court has jurisdiction to give leave to add the personal representative of the party so dying, and the application need not be made to the county court. BLAKEWAY *v.* PATTESHALL 247

2. —— *Appeal—Fine for Assaulting Bailiff in Execution of Duty—Contempt of Court—"Matter"—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 48, 120, 186.] No appeal lies from an order of a county court judge imposing a fine under s. 48 of the County Courts Act, 1888, for an assault upon an officer of the Court while in the execution of his duty.—By the interpretation section (s. 186) of the County Courts Act, 1888, "'Matter' shall mean every proceeding in the Court which may be commenced as prescribed otherwise than by plaint; and 'Prescribed' shall mean prescribed by the County Court Rules for the time being."—*Semble* that a proceeding in respect of which there is a form of summons given in the forms appended to the County Court Rules is a "matter" within the meaning of s. 186, although there is no county court rule prescribing how it shall be commenced. LEWIS *v.* OWEN 102

3. —— *Interpleader—Goods taken in Execution—Deposit in Court of Value of Goods by Claimant—Money deposited paid out to Judgment Creditor—Effect of—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 156—*County Courts Forms*, 1889, *Form* 187.] Goods, which had been taken in execution of the judgment of a county court, were claimed by a third party, who, under the provisions of s. 156 of the County Courts Act, 1888, deposited the value of the goods with the bailiff to abide the decision of the judge upon the claim. On the trial of an interpleader issue the claim was not established, and the money deposited was paid out to the judgment creditor. The money so paid out being insufficient to satisfy the judgment, the judgment creditor caused the goods to be seized again for the purpose of realizing the balance of his judgment. Upon a second interpleader issue between the same parties:—*Held*, that the judgment creditor was not entitled to seize the goods a second time, for that by taking out of Court the money deposited by the claimant, he estopped himself from thereafter disputing that as against himself the claimant was the owner of the goods. HADDOW *v.* MORTON. TROUT, CLAIMANT - - - - 95

4. —— *Interpleader—Goods taken in Execution—Deposit in Court of Value of Goods by Claimant—Money deposited paid out to Judgment Creditor—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 156—*County Court Forms*, 1889, *Form* 187.] Goods, which had been taken in execution of the judgment of a county court, were claimed by a person who, under the provisions of s. 156 of the County Courts Act, 1888, deposited the value of the goods with the bailiff to abide the decision of the judge upon the claim. On the trial of an interpleader issue the claim was not established, and the money deposited was paid out to the judgment creditor. The money so paid out being insufficient to satisfy the judgment, the judgment creditor caused the goods to be seized again for the purpose of realizing the balance of his judgment. The claimant again claimed them and deposited their value with the bailiff. Upon a second interpleader issue between the same parties:—*Held*, affirming the judgment of the Queen's Bench Division, that, by taking out of Court the money deposited by the claimant on the first occasion, the judgment creditor accepted the money in lieu of the goods, and thereby estopped himself in respect of the same judgment from denying that as against himself the claimant was the owner of the goods; and therefore that the claimant was entitled to judgment on the issue. HADDOW *v.* MORTON. TROUT, CLAIMANT - - - - C. A. 565

5. —— *Jurisdiction—"District within which Cause of Action wholly or in part arose"—Goods Sold and Delivered—Non-payment within District in which Action brought—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 74.] In an action to recover the price of goods sold and delivered, the default in payment is part of the cause of action. The county court within the district of which the payment ought to be made has therefore, under s. 74 of the County Courts Act, 1888, jurisdiction over such an action, although the defendant resides and the contract was made and the goods delivered without the jurisdiction. NORTHEY STONE COMPANY *v.* GIDNEY - - C. A. 99

6. —— *Practice—Default Summons issued out of Jurisdiction—Affidavit, Form of—Claim exceeding* 5*l.—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43, *ss.* 74, 86—*Order v., rr.* 9*a*, 10 (*County Court Rules*, 1889)—*Form* 14A.] Where a plaintiff in a county court, whose claim exceeds 5*l.*, seeks to issue a default summons out of the jurisdiction of such court, the affidavit filed by the plaintiff for that purpose need not contain a statement that the defendant does not belong to any of the classes of persons mentioned in Order v., rule 10, of the County Court Rules, 1889, such a statement not being material where the claim exceeds 5*l.* GORDON *v.* EVANS - - - C. A. 248

7. —— *Practice—Jurisdiction of Registrar—Non-appearance of Defendant at Hearing—Case taken as Undefended—Proof of Debt where Action commenced by Default Summons—Power to strike out Counter-claim—Prohibition—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 90—*County Court Rules*, 1889, *Order* XXII., *r.* 6.] In an action on a solicitor's bill, commenced by default summons in a county court, the defendant gave notice of defence, and also notice of a counter-

COUNTY COURT—*continued.*
claim for negligence. The case was called on during vacation, at a time when the judge of the county court was not sitting. The defendant did not appear, and the plaintiff applied for judgment. The registrar gave judgment for the plaintiff, without requiring proof of the debt, other than that supplied by the affidavit filed with the summons, and struck out the counter-claim. On an application for a prohibition to the judge of the county court from further proceeding in the matter of the judgment so obtained:—*Held* (affirming the judgment of the Queen's Bench Division), that, even if the registrar was wrong in giving judgment without further proof of the debt, and had no authority to strike out the counter-claim, there was no ground for prohibition. HOOPER *v.* HILL - - - C.A. 659

—— Absence of jurisdiction apparent on face of proceedings—Discretion — Acquiescence in exercise of jurisdiction - - 552
See PROHIBITION.

—— Bankruptcy—Appeal from county court—Sending notice of appeal to registrar—Irregularity—Discretion to extend time
See BANKRUPTCY. 3. [259

—— Jurisdiction — Winding-up—Registered industrial society - - - 828
See COMPANY. 2.

CRIMINAL LAW — *Embezzlement — "Clerk or Servant"—Director of Company*—24 & 25 *Vict. c.* 96, *s.* 68.] A director of a limited company, who is also employed as a servant to collect moneys for them, is liable to be convicted of embezzlement as a "clerk or servant" of the company under 24 & 25 Vict. c. 96, s. 68. THE QUEEN *v.* STUART - - - C. C. R. 310

2. —— *Embezzlement — Illegal Association — Properly—Beneficial Owners*—31 & 32 *Vict. c.* 116, *s.* 1 — *Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 4.] The defendant was convicted on an indictment, drawn under 31 & 32 Vict. c. 116, s. 1, and charging him with having, whilst one of a number of beneficial owners consisting of himself, J., and others, embezzled money belonging to such beneficial owners. It was proved at the trial that the prisoner was the treasurer and a member of a trading club, which was an unregistered association of more than twenty persons such as is prohibited from being formed by s. 4 of the Companies Act, 1862, and that he received money belonging to the association and failed to pay over or account for it:—*Held*, that the prisoner was properly convicted. THE QUEEN *v.* TANKARD - - - - C. C. R. 548

3. —— *Extradition—Theft — Production of alleged Stolen Property by Purchaser under subpœna duces tecum—Detention of Property for purposes of Trial in Foreign State—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *s.* 9—11 & 12 *Vict. c.* 44, *s.* 5.] Upon the hearing by a magistrate of an application for the extradition of a fugitive criminal upon a charge of theft committed in France, certain articles were produced under a subpœna duces tecum by a witness who had purchased them from the accused person in England, and were identified as part of the property stolen.

CRIMINAL LAW—*continued.*
The magistrate, having committed the accused to prison to await a warrant from the Secretary of State for his extradition, orally directed a constable in court to take charge of the property so produced and identified, in order that it might be produced at the trial in France. The purchaser applied under 11 & 12 Vict. c. 44, s. 5, for an order directing the magistrate to order the property to be delivered up to him:—*Held*, that the magistrate was functus officio as soon as he had committed the accused to prison; that any subsequent direction as to the property, whether given or omitted, was not an act relating to the duties of his office, and that under 11 & 12 Vict. c. 44, s. 5, the Court had no jurisdiction to make the order:—*Held*, further, that, assuming the Court had jurisdiction to make the order, the purchaser's possessory title (if any) to the goods had been lawfully divested by reason of their passing out of his possession under the subpœna duces tecum, and that he was therefore not entitled to the relief asked. THE QUEEN *v.* LUSHINGTON. EX PARTE OTTO - - - - 420

4. —— *Misdemeanor—New Trial—Obstruction of Highway — Conviction — Evidence—Admissibility—Evidence of Reputation—Map of Inclosure Award, whether admissible to prove Boundaries of Ancient Highway.*] Where the defendant is found guilty on an indictment, preferred in the Queen's Bench Division, for obstructing a highway, a new trial may be granted on the grounds of misdirection, misreception of evidence, and verdict against evidence.—On the trial of such an indictment the map attached to an old inclosure award, shewing an ancient highway in existence when the award was made, is inadmissible as evidence of reputation to prove the boundaries of the highway at the date of the award against a defendant whose property lies adjacent to the highway, and was not subject to the jurisdiction of the Inclosure Commissioners in making their award. THE QUEEN *v.* BERGER [823

5. —— *Offences against the Person—Carnal Knowledge of Girl between Thirteen and Sixteen—Aiding and Abetting Misdemeanor—Inciting to Commit Offence—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 5.] It is not a criminal offence for a girl between the ages of thirteen and sixteen to aid and abet a male person in committing, or to incite him to commit, the misdemeanor of having unlawful carnal knowledge of her contrary to s. 5 of the Criminal Law Amendment Act, 1885. THE QUEEN *v.* TYRRELL [C. C. R. 710

DAMAGE-FEASANT — Distress — Damage for which things may be distrained - 608
See DISTRESS.

DAMAGES—Charterparty—Default in loading full cargo—Deduction in respect of freight earned by shipowner - 773
See SHIP. 2.

—— Measure of—Husband and wife—Contract in consideration of marriage - 466
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DAMAGES—*continued.*

—— Principal and agent—Liability of agent—Receipt of payment by cheque instead of cash - - - - - 272
See PRINCIPAL AND AGENT.

DEATH — County court — Appeal — Death of parties pending appeal—Jurisdiction of High Court to add legal representatives
See COUNTY COURT. [247

DEFAMATION—*Libel—Action for, by Joint Stock Company — Corporation — Statement affecting Business Reputation of Trading Corporation—Special Damage, Absence of.*] An action of libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business, without proof of special damage.—The sanitary condition of a large number of cottages let by the proprietors of a colliery to their workmen is a matter of public interest, fair comment on which is not libellous. SOUTH HETTON COAL COMPANY *v.* NORTH-EASTERN NEWS ASSOCIATION - C. A. 133

2. —— *Libel—Injunction—Interlocutory Injunction pending Trial—Exhibition of Effigy whether Libellous—Question for Jury whether Plaintiff consented to Exhibition—Discretion—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.] The plaintiff had been tried in Scotland upon a charge of murder by shooting with a gun. The jury returned a verdict of "Not proven." The proprietors of an exhibition of wax figures, representing celebrated and notorious personages, exhibited a portrait model of the plaintiff with a gun described as his gun. The figure was placed in a room within a turnstile, at which an extra sixpence was charged for admission. This room also contained figures of the Emperor Napoleon I. and three other persons, of whom one was convicted of murder, another committed suicide to avoid arrest, and another was a person charged with having been concerned in the alleged murder with which the plaintiff was charged, but who could not be found. There were other objects of interest in the room, such as relics of the Emperor Napoleon and the Duke of Wellington. From this room access could be obtained by descending some stairs, without further payment, to a room called the "Chamber of Horrors," in which were exhibited figures representing for the most part notorious murderers, and also relics and models of the scenes of murders. In this room there was a model of the spot where the murder with which plaintiff was charged was alleged to have taken place. The plaintiff sued the proprietors of the exhibition for libel, and applied for an interlocutory injunction to restrain the defendants from exhibiting the figure of himself pending the trial of the action. It appeared that the defendants did not intend to justify, the defence being simply that the exhibition was not libellous:—*Held*, by the Queen's Bench Division (Mathew and Collins, JJ.), that the case was so clearly one of libel, that a verdict to the contrary ought to be set aside as unreasonable, and therefore, under the circumstances, an interlocutory injunction ought to be granted.—On appeal, it appeared from further affidavits filed that there would be a question at the trial whether the plaintiff had consented to the exhibition complained of:—*Held*, by the Court of Appeal (Lord Halsbury, Lopes, L.J., and Davey, L.J.), that, that being so, according to the rule laid down in *Bonnard* v. *Perryman* ([1891] 2 Ch. 269), an interlocutory injunction ought not to be granted.—By Lord Halsbury: The decision in *Bonnard* v. *Perryman* ([1891] 2 Ch. 269) cannot be considered as laying down an absolute rule limiting the jurisdiction given to the Court by the Judicature Act, 1873, s. 25, sub-s. 8, to grant an injunction by interlocutory order where it shall appear to them to be just or convenient; and, but for the question raised by the further affidavits, a clear case of libel having been shewn to the Court, the injunction ought to have been granted.—By Lopes, L.J., and Davey, L.J.: The judgment of the Court of Appeal in *Bonnard* v. *Perryman* ([1891] 2 Ch. 269) lays down an absolute rule of practice with regard to the circumstances under which an interlocutory injunction ought to be granted pending the trial in actions of libel.—By Lopes, L.J.: There not being so clear a case of libel that a verdict to the contrary ought to be set aside as unreasonable, according to the rule in *Bonnard* v. *Perryman* ([1891] 2 Ch. 269), the injunction ought not to be granted.—By Lord Halsbury and Davey, L.J.: The jurisdiction to issue injunctions in cases of libel is not confined to cases of libels affecting a trade or business. MONSON *v.* TUSSAUDS, LIMITED. MONSON *v.* LOUIS TUSSAUD - - - - - C. A. 671

3. —— *Libel—Privileged Occasion—Solicitor—Letter written in ordinary course of Duty to Client.*] A solicitor, acting on behalf of his client, gave written notice to an auctioneer not to part with the proceeds of the sale of certain goods, intrusted to him for sale, on the ground that the owner of the goods had committed an act of bankruptcy upon which an order in bankruptcy might be made against him. In an action by the owner of the goods against the solicitor for libel:—*Held*, that the occasion was privileged, since the solicitor was acting in the ordinary course of his duty to his client, and the occasion would have been privileged had the client himself written the letter.—*Blackham* v. *Pugh* (2 C. B. 611) approved. BAKER *v.* CARRICK - - - C. A. 838

4. —— *Libel—Privileged Occasion—Solicitor acting in discharge of his Duty to his Client—Publication—Letter dictated to Clerk—Letter copied by Clerk.*] A solicitor, acting on behalf of his client, wrote and sent to the plaintiff a letter containing defamatory statements regarding her. The letter was dictated to a clerk in the office, and was copied into the letter-book by another clerk. In an action against the solicitor for libel:—*Held*, that the occasion was privileged, since the communication if made by the solicitor direct to the plaintiff would have been privileged, and the publication to his clerks was necessary and usual in the discharge of his duty to his client, and was made in the interest of the client.—*Pullman* v. *Hill & Co.* ([1891] 1 Q. B. 524) distinguished. BOXSIUS *v.* GOBLET FRÈRES - - - C. A. 842

DEMURRAGE — Charterparty — Restraints of princes and rulers—Customary mode of loading - - - - 174
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DEMURRAGE—*continued.*

—— Option of charterer as to port of discharge—Unloading delayed by strike at port to which vessel ordered - - 179
See SHIP. 4.

DISQUALIFICATION—Election of mayor—Office of profit—Candidate voting for himself—Interest in lease—Letting for one day—Right of chairman to vote—Casting vote
See MUNICIPAL CORPORATION. [767

—— Interest—Judicial inquiry—Personal interest of member of tribunal - 750
See MEDICAL PRACTITIONER.

DISTRESS—*Damage Feasant—For what Damage Things may be Distrained.*] The damage in respect of which trespassing animals may be distrained damage feasant is not confined to damage to the freehold, but includes injuries to other animals. BODEN *v.* ROSCOE - - - 608

—— Landlord and tenant—Entry—Getting over wall into yard - - - 119
See LANDLORD AND TENANT. 2.

DISTRICT REGISTRY—Cause proceeding in district registry—Interpleader - 240
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DRUNKENNESS — Permitting drunkenness on licensed premises—Ignorance of licensed person - - - - 574
See LICENSING ACTS. 2.

ELECTION—Municipal - - - 767
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EMBEZZLEMENT — "Clerk or servant"—Director of company - - - 310
See CRIMINAL LAW.

—— Illegal association—Property—Beneficial owners - - - - 548
See CRIMINAL LAW. 2.

ESTOPPEL—*Conduct—Sale by Agent—Condition against selling without further Authority—Title of Purchaser from Agent—Goods entrusted for Sale—Sale in ordinary course of Business—Factors Acts* (6 *Geo.* 4, *c.* 94, *s.* 4; 52 *&* 53 *Vict. c.* 45, *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1).] Plaintiff was the owner of an opal matrix tabletop, which he entrusted to an agent, who was a dealer in jewels and gems, and, as a known part of his business, sold jewels and gems for other people, in his own name, and having them in his own possession. The tabletop was entrusted on the terms that it should not be sold to any person nor at any price without plaintiff's authority, and that the cheque received in payment should be handed to plaintiff intact, plaintiff agreeing to pay certain commission. The agent sold the tabletop to defendant for 200*l.*, which was satisfied by defendant giving to a judgment creditor of the agent a diamond worth 120*l.*, and paying him 50*l.*, in satisfaction of a judgment for 170*l.*, and paying 30*l.* to the agent.—In an action to recover possession of the tabletop:—*Held*, that, as by the conditions on which the tabletop was entrusted to the agent he could not sell it without obtaining further authority, he was acting outside his authority in selling at all, and therefore defendant acquired no title by the sale, and plaintiff was not estopped from disputing his title, but was entitled to recover in spite of the sale:—*Held* also that, as the tabletop never was entrusted for sale, and as, having regard to the manner in which payment was made, the sale was not in the ordinary course of business, defendant was not protected by the Factors Act which was in force at the date of the transaction (6 Geo. 4, c. 94, s. 4). BIGGS *v.* EVANS - - - - 88

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EVIDENCE—Boundaries of ancient highway—Map of inclosure award - - 823
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—— Foreign sovereign—Proof of status of sovereign—Certificate of Secretary of State
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EXECUTION—Executor of judgment creditor—Receiver - - - - 448
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—— Interpleader—Goods taken in execution—Deposit in Court of value of goods by claimant—Money deposited paid out to judgment creditor - - - 95
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—— Interpleader—Goods taken in execution—Deposit in Court of value of goods by claimant—Money deposited paid out to judgment creditor - - - 565
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—— Receiver, appointment of—"Equitable execution" - - - - 801
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—— Sale by sheriff by private contract—Execution for more than 20*l.* - - 79
See SHERIFF.

EXECUTOR—Liability to calls—Service of notice
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EXTRADITION—Theft—Detention of property for purposes of trial in foreign State 420
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FIRE ENGINE—Expenses of use of—Local authority—"Owner" - - - 349
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FIXTURES—Mortgage—Trade fixtures—Hire and purchase agreement—Rights of mortgagee against owner of the fixtures
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FOOTWAY—Metropolis—Paving expenses 633
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FOREIGN SOVEREIGN—Immunity—Proof of status of sovereign - - - 149
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FORFEITURE—Relief—Breach of covenant to repair—Liability of underlessee for costs of lessor's solicitor and surveyor - 472
See LANDLORD AND TENANT.

FRAUDS, STATUTE OF (29 *Car.* 2, *c.* 3), *s.* 4—*Guarantee—Oral Agreement to Share Commissions and Losses on Stock Exchange Transactions.*] The plaintiffs, who were stockbrokers, entered into an oral agreement with the defendant that he should introduce clients to them, and that the plaintiffs

FRAUDS, STATUTE OF—*continued.*
should transact business on the Stock Exchange for the clients thus introduced, upon the terms that, as between the plaintiffs and the defendant, the defendant should receive half the commission earned by the plaintiffs in respect of any transactions by them for any clients introduced by the defendant, and that he should pay to the plaintiffs half of any loss which might be incurred by them in respect of such transactions. The plaintiffs claimed to recover from the defendant half the loss which they had incurred in Stock Exchange transactions which they had entered into on behalf of one Robertson, who had been introduced to them by the defendant:—*Held*, that, the defendant having an interest in the transactions, equally with the plaintiffs, and the main object of the contract being to regulate the terms of the defendant's employment, the principle of *Couturier* v. *Hastie* (8 Ex. 40) applied, and the contract was not within s. 4 of the Statute of Frauds, and the action was maintainable, though the contract was not in writing. SUTTON & Co. *v.* GREY **C. A. 285**

FRIENDLY SOCIETY—*Dispute — Arbitration — Misconduct of Arbitrators—Decision of Arbitrators —Jurisdiction of Justices where no Decision— Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 22.] In an arbitration between a member of a friendly society and the society, arising out of a claim for sick-pay the arbitrators appointed under the rules of the society, after hearing the claimant, heard the evidence of two witnesses, in the absence of the claimant, who was excluded from the room, and given no opportunity of cross-examining the witnesses. By one of the rules of the society, "where no decision is made on a dispute within forty days after application for reference to arbitration, the member may apply to a Court of summary jurisdiction." The member applied to justices, who decided that, the arbitration having been improperly conducted, the decision of the arbitrators was void, and that consequently the justices had jurisdiction to hear and determine the dispute. On appeal on a special case stated by the justices:—*Held* (reversing the judgment of the Queen's Bench Division) that as the arbitrators had given a decision which was valid until set aside, the jurisdiction of the justices to hear the complaint did not arise.—*Reg.* v. *Grant* (14 Q. B. 43) distinguished. BACHE *v.* BILLINGHAM - **C. A. 107**

GASWORKS—Poor-rate—Occupation—Exclusive use - - - - - **196**
See POOR-RATE. 2.

GAMING—*Place used for Betting—Conviction for Keeping Room for Betting—Validity of Conviction though no Deposit Received—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.] By s. 1 of the Betting Act, 1853, "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, ... betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, &c., as or for the consideration for any assurance, undertaking, promise, or agreement . . . . to pay or give thereafter any money or valuable thing

GAMING—*continued.*
on any event or contingency of or relating to any horse-race, &c.; and s. 3 imposes a penalty.—The appellant was charged with keeping a room, being the occupier, for the purpose of betting with persons resorting thereto, and the justices found that he had kept the room for that purpose; but it was not shewn that he kept it for the purpose of receiving deposits on bets:—*Held*, that s. 1 creates two separate and distinct offences—namely, keeping, &c., the places referred to, first, for the purpose of betting with persons resorting thereto, and, secondly, for the purpose of receiving deposits on bets, that the offence under the first part of the section was complete, and the appellant was rightly convicted. BOND *v.* PLUMB **169**

GUARANTEE—Agreement to share commissions and losses on Stock Exchange transactions - - - - **285**
See FRAUDS, STATUTE OF.

—— Insurance of securities—Contract to insure payment of sum deposited with bank **54**
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HACKNEY CARRIAGE—Negligence of driver—Liability of proprietor - - **292**
See NEGLIGENCE.

HIGHWAY—*Repair*—"*Extraordinary Traffic*"—*Highways and Locomotives* (*Amendment*) *Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.] The standard of comparison by which to determine whether traffic is "extraordinary" within the meaning of the Highways and Locomotives (Amendment) Act, 1878, s. 23, is the ordinary traffic on the road in question, not that on other roads in the district.—Therefore, where a colliery company, in carrying on their business, which was the staple trade of the district, caused to be conducted on a road traffic which was extraordinary as compared with the ordinary traffic of that road:—*Held*, that such traffic was rightly determined by magistrates to be "extraordinary traffic" within the section, although other coal-owners ordinarily used other roads in the district for similar purposes.—*Hill* v. *Thomas* ([1893] 2 Q. B. 333) followed. ETHERLEY GRANGE COAL COMPANY *v.* AUCKLAND DISTRICT HIGHWAY BOARD - - - **C. A. 37**

—— Nuisance—Liability of local authority **332**
See LOCAL GOVERNMENT.

—— Obstruction—Indictment—New trial **823**
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HUSBAND AND WIFE—*Contract in Consideration of Marriage—Promise to leave House to intended Wife for Life—Promiser putting it out of his Power to perform Promise—Immediate Right of Action—Claim of Damages—Measure of Damages —Power of Court to make Declaration of Right—Power to decree Conveyance after Death of Promiser.*] The defendant before, and as an inducement to, his marriage with the plaintiff promised in writing, as part of the terms of the marriage, to leave a house and land to her for her life. The plaintiff consented to the terms proposed, and the marriage took place; but the defendant subsequently conveyed the property by deed to a third person. In an action to recover damages for breach of contract:—*Held*, that as the defendant

HUSBAND AND WIFE—*continued.*
had put it out of his power to perform the contract there had been a breach, in respect of which the plaintiff had an immediate right of action to recover damages, and that the measure of such damages was the value of the possible life estate to which the plaintiff would be entitled if she survived the defendant:—*Held*, also, that where a proposal in writing to leave property by will, made to induce a marriage, is accepted, and the marriage takes place on the faith of it, if the proposal relates to a defined piece of real property the Court has power to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers. SYNGE *v.* SYNGE - - C. A. 466

ILLEGALITY—Stock Exchange—Sale or purchase of stock or marketable security—Contract note sent to principal—Omission to send contract note—Right of broker to recover commission - 114
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INDUSTRIAL SOCIETY—Winding-up—Jurisdiction of county court - - 828
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INFANT—Partner—Receiving order — Partnership firm - - - - 1
See BANKRUPTCY.

INJUNCTION—Breach of contract—Theatrical engagement—Contract to act with a company for a certain period—Stipulation against acting elsewhere - 125
See PRACTICE. 5.

—— Libel — Interlocutory injunction pending trial—Exhibition of effigy whether libellous—Question for jury whether plaintiff consented to exhibition—Discretion 671
See DEFAMATION. 2.

INSURANCE OF SECURITIES—*Contract to Insure Payment of Sum deposited with Bank—Contract whether of Suretyship or Insurance—Scheme of Arrangement between Bank and Creditors—Statutory Discharge—Surety, Discharge of—Accord and Satisfaction.*] By an instrument purporting to be a "policy of insurance," it was witnessed that the defendants guaranteed to the "assured," the plaintiff, payment of a sum of money deposited by her in a bank in Australia, if the bank should make default in paying the same. The bank made default in payment of the sum deposited. Subsequently to such default a scheme of arrangement between the bank and its creditors was, under the provisions of a statute of the colony, sanctioned by a meeting of creditors and the colonial Court. By this scheme the bank was to be wound up and a new bank constituted, the creditors becoming entitled to certain rights against the new bank in satisfaction of their debts. The plaintiff did not assent to this scheme, which, however, was binding upon her by the colonial statute:—*Held* (affirming the judgment of the Queen's Bench Division), that the defendants remained liable to the plaintiff under their

INSURANCE OF SECURITIES—*continued.*
contract notwithstanding the scheme of arrangement.—By Lord Esher, M.R., and Lopes, L.J.: The contract was upon its true construction one of insurance against a certain event, viz., the bank's default, and, that event having happened, the defendants were liable to pay the sum insured, but would be entitled, the contract being one of indemnity, upon payment to be subrogated to the rights of the plaintiff under the scheme of arrangement.—By Kay, L.J.: Whether the contract was one of suretyship or one of insurance, the scheme of arrangement, which operated to discharge the bank under the statute and not by way of accord and satisfaction, did not defeat the right which had vested in the plaintiff under the contract upon the default made by the bank. DANE *v.* MORTGAGE INSURANCE CORPORATION [C. A. 54

INTEREST—Bill of sale—Form—Validity 444
See BILL OF SALE.

—— Covenant for payment—Bill of sale - 598
See BILL OF SALE. 2.

—— Disqualification—Election of mayor—Office of profit—Candidate voting for himself—Interest in lease—Letting for one day—Right of chairman to vote—Casting vote
See MUNICIPAL CORPORATION. [767

—— Disqualification — Judicial inquiry — Personal interest of member of tribunal 750
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—— Disqualification—Justices—Appeal against poor-rate - - - - 416
See JUSTICES.

INTERNATIONAL LAW — *Foreign Sovereign, Immunity of—Extraterritoriality—Jurisdiction—Submission to Jurisdiction—Proof of Status of Sovereign—Certificate of Secretary of State.*] The Courts of this country have no jurisdiction over an independent foreign sovereign, unless he submits to the jurisdiction. Such submission cannot take place until the jurisdiction is invoked.—Therefore, the fact that a foreign sovereign has been residing in this country, and has entered into a contract here, under an assumed name, as if a private individual, does not amount to a submission to the jurisdiction, or render him liable to be sued for breach of such contract.—A certificate from the Foreign or Colonial Office, as the case may be, is conclusive as to the status of such a sovereign. MIGHELL *v.* SULTAN OF JOHORE [C. A. 149

—— Ambassador, immunities and privileges of
See LIMITATIONS, STATUTE OF. [533

INTERPLEADER—Cause proceeding in district registry - - - - 240
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—— Goods taken in execution—Deposit in Court of value of goods by claimant—Money deposited paid out to judgment creditors
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—— Goods taken in execution—Deposit in Court of value of goods by claimant—Money deposited paid out to judgment creditor
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JURISDICTION—Foreign sovereign, immunity of—Extraterritoriality - - 149
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JUSTICES—*Jurisdiction—Disqualification by Interest—Appeals against Poor-rate—Special Sessions*—16 *Geo.* 2, *c.* 18, *ss.* 1, 3—27 *&* 28 *Vict. c.* 39, *s.* 6.] Justices sitting in special sessions to hear an appeal from an assessment committee, as to an assessment to a poor-rate, are within 16 Geo. 2, c. 18, s. 1, and are not disqualified from adjudicating on the appeal by reason of their being themselves chargeable with the rate in respect of which the appeal is brought. EX PARTE OVERSEERS OF WORKINGTON - - C. A. 416

—— Practice—Summons—Adulteration—Particulars of offence charged - 544
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LANDLORD AND TENANT—*Breach of Covenant to Repair—Liability of Underlessee for Costs of Lessor's Solicitor and Surveyor—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 2—*Conveyancing and Law of Property Act*, 1892 (55 *&* 56 *Vict. c.* 13), *s.* 2, *sub-s.* 1; *s.* 4.] The expression "lessee" in s. 14 of the Conveyancing and Law of Property Act, 1881, and in s. 2, sub-s. 1, of the Conveyancing and Law of Property Act, 1892, includes an underlessee of the whole of the premises comprised in the head lease, and the lessor is entitled to recover from such an underlessee the costs of solicitor and surveyor mentioned in the last-named section. *Burt* v. *Gray* ([1891] 2 Q. B. 98) distinguished.—A lessee who, in obedience to a notice from his lessor under s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, remedies the breach of covenant specified and makes the compensation demanded, and thereby renders unnecessary an application to the Court under sub-s. 2, for relief from forfeiture for such breach, "is relieved" under the provisions of that Act, within the meaning of s. 2, sub-s. 1, of the Conveyancing and Law of Property Act, 1892. NIND *v.* NINETEENTH CENTURY BUILDING SOCIETY 472

2. —— *Distress—Entry—Getting over Wall into Yard.*] A bailiff, in order to effect a distress for rent in a house, went through the next house and into the yard at the back. He then climbed over the wall into the yard of the house in which he was directed to distrain, and entered and distrained:—*Held*, a lawful distress.—*Eldridge* v. *Stacey* (15 C. B. (N.S.) 458) approved.—*Scott* v. *Buckley* (16 L. T. (N.S.) 573) questioned. LONG *v.* CLARKE - - - - C. A. 119

—— Action for recovery of land—Judgment under Order XIV.—Forfeiture—Notice to quit - - - - 796
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—— Nuisance — Reversioner, liability of — Weekly tenancy—Necessity for notice to determine - - - 164
See NUISANCE.

LANDS CLAUSES ACTS—Compensation—Damage from working of railway—Enlarging ventilating shaft - - 384
See RAILWAY. 3.

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—— Injunction—Exhibition of effigy whether libellous - - - - 671
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—— Privileged occasion — Solicitor — Letter written in ordinary course of duty to client - - - - 838
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—— Privileged occasion—Solicitor acting in discharge of his duty to his client—Publication—Letter dictated to clerk—Letter copied by clerk - - - 842
See DEFAMATION. 4.

LICENSING ACTS—*Beerhouse Licensed before May*, 1869—*House Pulled Down for Public Purpose—Transfer of Licence to New House—Discretion of Justices—Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 *&* 33 *Vict. c.* 27), *ss.* 8, 19.] A house, in respect of which a licence to sell beer to be consumed on the premises was in force on May 1, 1869, and was thenceforward renewed from time to time, was about to be pulled down for a public purpose. The holder of the licence applied to the justices in special sessions, under s. 14 of the Licensing Act, 1828, for a grant of a corresponding licence to sell beer to be consumed on the premises at another house to which it was proposed to remove:—*Held*, that the justices had a general discretion to refuse the application, and were not confined to the four grounds of refusal mentioned in s. 8 of the Wine and Beerhouse Act, 1869. TRAYNOR *v.* JONES - - - - 83

2. —— *Offences—Permitting Drunkenness on Premises—Ignorance of Licensed Person—Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 13.] A licensed person cannot be convicted, under s. 13 of the Licensing Act, 1872, of permitting drunkenness to take place on his premises, where the evidence shews that a person who was on the premises was in fact drunk, but the licensed person did not know that such person was drunk. *Somerset* v. *Hart* (12 Q. B. D. 360) approved and followed. *Bond* v. *Evans* (21 Q. B. D. 249) explained. SOMERSET *v.* WADE - - 574

3. —— *Renewal of Licence—Right to apply for Renewal—Application by Person other than the Licensed Person.*] The holder of a licence to sell by retail beer and cider on the licensed premises applied for a renewal of his licence at the general annual licensing meeting. His application was refused, and at the adjourned general annual licensing meeting S., who had in the meantime become tenant and occupier of the premises, applied for a renewal of the licence, which had not then expired:—*Held*, on the authority of *Reg.* v. *Justices of Liverpool* (11 Q. B. D. 638), that S. was a person entitled to apply for a renewal, although he was not the licensed person.—*Price* v. *James* ([1892] 2 Q. B. 428) discussed. SYMONS *v.* WEDMORE - 401

LIEN—Railway—Cloak room—Goods deposited by bailee - - - - 833
See RAILWAY.

LIMITATIONS, STATUTE OF—*Personal Action —International Law — Ambassador, Immunities and Privileges of—Debtor—Absence beyond Seas —Service of Writ out of the Jurisdiction*—21 *Jac.* 1, *c.* 16—4 & 5 *Anne, c.* 16, *s.* 19—7 *Anne, c.* 12, *s.* 3—*Rules of the Supreme Court*, 1883, *Order* XI.] Whilst the ambassador of a foreign State is in this country and accredited to the Sovereign, the Statute of Limitations (21 Jac. 1, c. 16) does not begin to run against his creditors. —The immunity of the ambassador of a foreign State from process in the Courts of this country extends for such a reasonable period after he has presented his letters of recall as is necessary to enable him to wind up his official business and prepare for his return to his own country, and he is not deprived of the immunity by reason that his successor is appointed before that period has elapsed. The Statute of Limitations does not begin to run against his creditors during such period.—By 4 & 5 Anne, c. 16, s. 19, where in certain specified actions a defendant is beyond the seas when the cause of action arises, the plaintiff shall be at liberty to bring his action after the defendant's return, so that he brings it, after the defendant's return, within the time limited by 21 Jac. 1, c. 16.—Order XI. of the Rules of the Supreme Court enables plaintiffs, by leave, in certain cases to serve a writ, or notice of a writ where the defendant is neither a British subject nor in British dominions, out of the jurisdiction:—*Held*, that Order XI. has not the effect of annulling the right of a plaintiff, under 4 & 5 Anne, c. 16, to bring his action after the defendant's return from beyond the seas within the time limited by 21 Jac. 1, c. 16. MUSURUS BEY *v.* GADBAN - - - - - 533

LOCAL GOVERNMENT—*Highway—Nuisance—Cover of Man-hole in Sewer—Wearing away of Road—Sewers and Highway Authority, Liability of*—38 & 39 *Vict. c.* 55 (*Public Health Act*, 1875), *ss.* 13-20, 144, 149.] In an action to recover damages for injury caused by negligence, it appeared that the defendants were an urban authority under the Public Health Act, 1875, having as such the property in and the management of the sewers and the streets, and that they had inserted a man-hole in one of the sewers. The cover of this man-hole was in the highway, was properly made and in good repair, but the road had been allowed to wear away so that the cover projected above the surface of the road. The plaintiff's horse stumbled over this projection and was injured.—*Held* (reversing the decision of Day and Wright, JJ., who had followed *Kent* v. *Worthing Local Board* (10 Q. B. D. 118)), that the only breach of duty which could be imputed to the defendants was their omission to repair the highway, that for this no action would lie, and that the defendants were not liable.—*Kent* v. *Worthing Local Board* (10 Q. B. D. 118) overruled. THOMPSON *v.* MAYOR, &C., OF BRIGHTON. OLIVER *v.* LOCAL BOARD OF HORSHAM C. A. 332

2. —— *Local Authority — Fire-engine — Expenses of Use of Fire-engine—"Owner"—Town Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 33.] By s. 33 of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), the expense incurred by the commissioners in sending engines beyond the limits of the special Act for extinguishing fire in the neighbourhood is to be borne by "the owners of the land or buildings where such fire shall have happened."—By s. 171 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), the provisions of the Town Police Clauses Act, 1847, with respect to fires are incorporated with the Act, and by s. 4 of that Act "owner" is defined as "the person receiving the rackrent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rackrent":—*Held*, overruling *Lewis* v. *Arnold* (Law Rep. 10 Q. B. 245), that the expense incurred by the commissioners was to be borne by the "owners" of the land or buildings as defined in the Public Health Act, 1875, and that the definition did not include an occupier of such land or buildings as tenant from year to year. SALE *v.* PHILLIPS - - 349

3. —— *Offences—Unsound Meat—Exposure for Sale—Guilty Knowledge of Seller how far essential to Offence—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117.] Upon the hearing of a summons under s. 117 of the Public Health Act, 1875, charging a person with having had in his possession, and deposited on his premises, for the purpose of preparation for sale, and intended for the food of man, meat which was unsound and unfit for the food of man, it is not necessary to shew that the defendant had personal knowledge of the condition of the meat. BLAKER *v.* TILLSTONE - - - 345

4. —— *Rates—Lighting Rate—Coal Mines—"Land"—"Houses, Buildings, and Property other than Land"—Poor Relief Act*, 1601 (43 *Eliz. c.* 2), *s.* 1—*Lighting and Watching Act*, 1833 (3 & 4 *Wm.* 4, *c.* 90), *s.* 33.] Coal mines are not "land," but are "property (other than land) rateable to the relief of the poor," within the meaning of s. 33 of the Lighting and Watching Act, 1833, and are therefore liable to be rated under that section at the higher rate.—By the Lighting and Watching Act, 1833 (3 & 4 Wm. 4, c. 90), s. 33, "Owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor . . . shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act." —The appellants were owners and occupiers of coal mines in the respondents' township, and were rated to a lighting rate under the above section at the higher rate. Their property consisted entirely of underground workings, having no shaft or opening to the surface within the township, and which were not, and could not be, lighted by the lighting of the township. The coal was taken by underground ways into an adjoining township, where it was brought to the surface. All the pits, shafts, houses, and buildings, used in getting coal in the respondents' township, were situate in the adjoining township, where they were rated to the poor, sanitary, lighting, and other rates. The appellants had no houses, buildings, or property of a like nature, in connection with the mines in the respondents'

LOCAL GOVERNMENT—*continued.*

township:—*Held*, on a case stated, that, as the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 1, expressly imposes the liability to poor rates on "lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods," the specific mention of coal mines in the above enumeration excluded coal mines from the term "lands," and therefore they were "property (other than land) rateable to the relief of the poor," and were rightly assessed at the higher rate. THURSBY *v.* CHURCHWARDENS AND OVERSEERS OF BRIERCLIFFE-WITH-EXTWISTLE - - - 567

5. —— "*Sewer*" — *Drain* — *Drain passing through Private Ground*—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 4.] A drain passing through private ground, but receiving the drainage of more than one building, is a "sewer" within the meaning of the Public Health Act, 1875. TRAVIS *v.* UTTLEY - - - 233

6. —— *Streets*—*New Street*—*Width*—*Construction*—*Bye-laws*—*Laying out New Street*—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157.] By the Public Health Act, 1875, s. 157, every urban sanitary authority may make bye-laws with respect to the width and construction of new streets.—The respondents, an urban sanitary authority, made bye-laws providing that every person who should lay out a new street exceeding 100 feet in length should lay out such street as a carriage road, with footways, and of a width of not less than thirty-six feet.—The appellant was lessee of a piece of ground, together with a right of way over the adjoining road, which was fifteen feet wide, for a distance of more than 100 feet.—The appellant commenced to build two houses on the ground of which he was lessee, but did not widen the road over which he had a right of way to thirty-six feet. He was summoned by the respondents for laying out a new street of a width of less than thirty-six feet, contrary to the bye-laws:—*Held*, that what the appellant had done, in commencing to erect the houses on the piece of ground adjoining the road, did not amount to laying out the road as a new street, and therefore he was not liable to be convicted. GOZZETT *v.* MALDON URBAN SANITARY AUTHORITY - - - - - 327

—— Nuisance on foreshore of navigable river—Inability to find person causing nuisance—Liability of owner of foreshore to abate nuisance - - - 647
See RIVER.

MARRIAGE—Contract in consideration of marriage—Promise to leave house to intended wife for life - - 466
See HUSBAND AND WIFE.

MASTER AND SERVANT—*Remedies*—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90)—*Miner*—*Trade Union*—*Refusal to Work*—*Breach of Contract*—*Damages.*] At the hearing of a complaint under the Employers and Workmen Act, 1875, by the proprietors of a coal mine against the defendant, one of their workmen, it appeared that the workmen were employed under contracts determinable on fourteen days' notice, and subject to certain regulations under which the employer might dismiss or suspend any workman for disobedience to orders, and the workmen, in descending or ascending the mine in the "cages," were to obey the orders of the banksman. Part of the miners employed at the colliery, including the defendant, were members of a trade-union. The unionists addressed a notice to the complainants that, at the expiration of fourteen days, all non-unionists must descend and ascend the mine by themselves. On the morning of the day on which such notice expired, certain workmen, of whom the defendant was one, were at the pit-mouth for the purpose of going down by the "cage" then in readiness for them. The first to enter the cage was a non-unionist, whereupon the other men, who were unionists, refused to go down with him. The non-unionists then went down alone, and, upon the next cage coming up a few seconds afterwards, the unionists offered to go down; but the under-manager in charge refused to allow them to do so. This occurred on three successive days.—The justices ordered the defendant to pay substantial damages for wrongfully "absenting" himself from the complainants' service, and dismissed a counter-claim by him against them for having wrongfully refused to allow him to follow his lawful employment:—*Held*, affirming the determination of the justices, that, under the circumstances, there had been such a breach of contract on the part of the defendant as entitled the complainants to substantial, and not merely to nominal, damages, and that the counter-claim could not be maintained. BOWES AND PARTNERS *v.* PRESS - - - - - C. A. 202

—— Cab proprietor and driver—Negligence of driver—Liability of proprietor - 292
See NEGLIGENCE.

MAYOR'S COURT — *Practice* — *Appeal to High Court* — *Security for Costs* — *Claim over* 20*l.*—*Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 8—*Order* LIX., *rr.* 10–17.] The provision of s. 8 of the Mayor's Court Act, 1857, as to the obligation of a party appealing, in an action for the recovery of more than 20*l.*, to give security for costs, is not repealed by Order LIX., rr. 10–17. MORGAN *v.* BOWLES 236

MEAT — Unsound — Exposure for sale — Guilty knowledge of seller how far essential to offence - - - - 345
See LOCAL GOVERNMENT. 3.

MEDICAL PRACTITIONER—*General Council of Medical Education and Registration*—*Removal of Name from Register*—*Power of Court to review decision* — "*Infamous conduct in a professional respect*"—*Judicial Inquiry*—*Domestic Forum*—*Personal Interest of Member of Tribunal*—*Medical Act* (21 & 22 *Vict. c.* 90), *ss.* 28, 29.] By the Medical Act (21 & 22 Vict. c. 90) the General Council of Medical Education and Registration were established, one of their duties being to keep a register of medical practitioners. By s. 29: "If any registered medical practitioner shall, after due inquiry, be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase

MEDICAL PRACTITIONER—*continued.*
the name of such medical practitioner from the register." The General Council, acting under the foregoing section, held an inquiry into the conduct of the plaintiff, a medical practitioner who was on the register. It was proved that he had published a great number of advertisements in newspapers, which contained reflections upon medical men generally and their methods of treating their patients, and advised the public to have nothing to do with them or their drugs. The advertisements also recommended the public to apply to the plaintiff for advice, and stated his address and the amount of the fee which he charged. The Council judged that the plaintiff had been "guilty of infamous conduct in a professional respect," and directed his name to be erased from the register:—*Held*, that there was evidence upon which the council could reasonably hold that the plaintiff had been guilty of infamous conduct in a professional respect, and that, this being so, the Court could not review their decision:—*Held*, further, that, if it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful and dishonourable by his professional brethren of good repute and competency, it is open to the council to find that he has been "guilty of infamous conduct in a professional respect."—The inquiry was instituted at the instance of the committee of a society called the Medical Defence Union, whose objects were "to support and protect the character and interests of medical practitioners; to promote honourable practice; and to suppress or prosecute unauthorized practitioners." One member of the council who took part in the inquiry had been a member and a vice-president of this society, and as vice-president was an ex-officio member of the committee. He had, however, never attended any of the meetings of the committee, and until after he had been elected a member of the council he did not know that proceedings were being taken against the plaintiff. He was elected a member of the council on May 3, and on the same day he sent in his resignation of his membership of the Defence Union. By the articles of association of that society 'any member might withdraw by giving two months' notice of his intention so to do, "and upon the expiration of such notice he shall cease to be a member." The inquiry was held on May 28:—*Held*, that such member of the council was not disqualified from taking part in the inquiry. ALLINSON *v.* GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION [C. A. 750

MENS REA—Permitting drunkenness on licensed premises—Ignorance of licensed person *See* LICENSING ACTS. 2. [574

—— Unsound meat—Exposure for sale - 345
See LOCAL GOVERNMENT. 3.

METROPOLIS—*Building Acts—Builder engaged in erecting Building—Notice to conform to Provisions of Act—Order of Magistrate to enforce Compliance with Notice—Completion of Building between dates of Notice and Order—Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *ss.* 45, 46.] By s. 45 of the Metropolitan Building Act, 1855, if in erecting any building anything is done contrary to any of the rules of the Act, the district surveyor shall give to the "builder engaged in erecting such building" notice requiring him to remedy the breach. By s. 46: "If the builder to whom such notice is given makes default in complying with the requisition thereof," a justice of the peace may make an order directing him to comply with such requisition:—*Held*, that a justice has no jurisdiction to make an order under s. 46 upon a builder who at the date of the order has completed the building and given up possession of it, even though he was engaged in erecting it at the time of the service upon him of the notice under s. 45. WALLEN *v.* LISTER - 312

METROPOLIS—*continued.*

2. —— *Footway—Expense of Flagging Footway—Owners of Houses and Land bounding or abutting on Road or Street—Metropolis Management Act*, 1862, *Amendment Act*, 1890 (53 & 54 *Vict. c.* 54), *s.* 1.] By s. 1 of the Metropolis Management Act, 1862, Amendment Act, 1890 (53 & 54 Vict. c. 54), the expense of flagging a footway is to be borne by "the owners of the houses and the owners of the land bounding or abutting on the road or street in which such footway is situate . . .: Provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property":—By s. 4, s. 250 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), which enacts that "the word 'street' shall include any road and a part of any road" is to apply to the provisions of the Act of 1890:—*Held*, that, under s. 1, subject to the proviso, the expense of flagging is to be borne by the owners of the houses and the owners of the land on both sides of the road or street, or on both sides of the section of the road or street, in which the footway is situate. VESTRY OF PADDINGTON *v.* NORTH METROPOLITAN RAILWAY AND CANAL COMPANY - - - - 633

3. —— *Management Acts—General Line of Buildings—Building begun before establishment of—Right of Owner to continue without regard to subsequent Building Line—Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.] In 1890 the owner of certain land in the metropolis adjoining a newly-laid-out street, deposited with the vestry of the parish plans for the erection of a shop on the side of such street, and in the same year in accordance with the plans he constructed the footings for the external walls of two sides of the shop, one side being that adjoining the street, and upon the footings on such side he raised the external wall to a height of twelve feet above the level of the street. He then suspended his building operations. At that date there was no other building on either side of the street. In 1892 he built a row of houses on the same side of the street, but standing ten feet further back from the street than the shop above mentioned. Subsequently he leased the site of the shop to the appellant, who in January, 1893, without the consent of the London County Council, continued the erection of the shop in accordance with the plans of his lessor. In March, 1893, the superintending architect decided that the general line of buildings in the street was that of the above-mentioned row of houses. The appellant was thereupon summoned

METROPOLIS—*continued.*

for having, contrary to the provisions of s. 75 of the Metropolis Local Management Act, 1862, erected a building beyond the general line of buildings in the street without the consent of the London County Council:—*Held*, that the fact that the appellant's lessor had commenced the building prior to the existence of a general building line did not entitle the appellant to continue such building after the general building line was established, and that an order, that the appellant should demolish so much of the building as had been erected by him in advance of the general building line, was rightly made. WENDON *v.* LONDON COUNTY COUNCIL - - - 227

4. —— *Management Acts—General Line of Buildings—Work done before establishment of general Building Line—What amounts to a "Building, Structure or Erection"—Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.] In 1890 the owner of land in the metropolis adjoining a newly-laid-out street deposited with the vestry of the parish plans for the erection of a shop on the side of such street, and in the same year, in accordance with the plans, he constructed the footings for the external walls of two sides of the shop, one side being that adjoining the street, and upon the footings on that side he raised the external wall to a height of twelve feet above the level of the street; he then suspended his building operations. At that date there was no other building on either side of the street. In 1892 he built a row of houses on the same side of the street, but standing ten feet further back from the street than the shop above mentioned. Subsequently he leased the site of the shop to the appellant, who in January, 1893, without obtaining the consent of the London County Council, proceeded to erect the shop in accordance with the plans deposited by his lessor. In March, 1893, the superintending architect of the London County Council decided the general line of buildings on that side of the street to be the main fronts of the above-mentioned row of houses. The appellant was thereupon summoned for having, contrary to the provisions of s. 75 of the Metropolis Local Management Act, 1862, erected a building beyond the general line of buildings in the street without the consent in writing of the London County Council:—*Held* (affirming, but on different grounds, the judgment of the Queen's Bench Division), that the wall which had been built before the general building line came into existence was not, in fact, a building, structure, or erection within the meaning of the Act; that the land was therefore at that time vacant land for the purposes of the Act; that the acts of the appellant after the building line came into existence amounted to the erection of a building beyond the general building line; and that an order that he should demolish so much of the building as had been erected by him in advance of such line was rightly made.—*Semble* (*per* Lord Esher, M.R., and Davey, L.J.), that s. 75 of the Metropolis Local Management Act, .1862, does not prevent the subsequent completion of a building existing in an unfinished state at the time when the general building line is established. WENDON *v.* LONDON COUNTY COUNCIL C. A. 812

METROPOLIS—*continued.*

5. —— *Management Acts—Repair of Carriage Road—Necessary Works of Repair—Apportionment and Recovery of Expenses—Question as to Necessity of Works—Right of Local Authority to decide—Metropolis Management Amendment Act*, 1890 (53 & 54 *Vict. c.* 66), *s.* 3.] Under s. 3 of the Metropolis Management Amendment Act, 1890, which empowers vestries or district boards to execute any necessary works of repair upon carriage roads, and to apportion and recover the expenses, it is for the vestry or district board to decide as to the necessity of the works, and they are not bound to prove such necessity to the satisfaction of the tribunal before which they seek to recover the expenses. STROUD *v.* WANDSWORTH DISTRICT BOARD OF WORKS - - - 64

6. —— *Management Acts—Streets—New Street—Expenses of Paving—"Owners of Land"—Land set apart by Statute exclusively for Burial Purposes—Liability of Cemetery Company for Paving Expenses—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management (Amendment) Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.] By the Metropolis Management Acts, 1855 and 1862 (which are to be construed together as one Act), the "owners of the land" abutting on a new street are made liable to contribute to the expenses of paving the same incurred, or to be incurred, by the vestry of the parish, and by s. 250 of the Act of 1855 "the word 'owner' shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, or who would so receive the same if such lands or premises were let at a rack-rent."—A cemetery company were, by statute, prohibited from selling or disposing of any of the consecrated land belonging to them, and such land was for ever to be set apart and used exclusively for purposes of Christian burial; but they were empowered to make profits by (amongst other things) selling or disposing of, at prices to be agreed upon, the exclusive right of burial, either in perpetuity or for a limited period, in vaults made by them, and the right to make family and other vaults, with the exclusive right of burial therein either in perpetuity or for a limited period. The company having been called upon by the vestry of the parish to contribute to the expenses of paving a new street on which consecrated land, forming part of their cemetery, abutted:—*Held*, that the company were "owners" of the land within the definition of s. 250 of the Metropolis Management Act, 1855, and therefore liable to contribute to such expenses. THE VESTRY OF ST. GILES, CAMBERWELL *v.* THE LONDON CEMETERY COMPANY - - - - - 699

MILK—Adulteration - - - 296
See ADULTERATION. 3.

MORTGAGE—*Trade Fixtures—Hire and Purchase Agreement—Rights of Mortgagee against Owner of the Fixtures.*] By agreement between the defendants and E., who was tenant for a term of years of a piece of land, the defendants agreed to supply him with a boiler for the purpose of his trade, to be paid for by instalments and to remain the property of the defendants till

MORTGAGE—*continued.*
all the instalments were paid; and it was further agreed that in case of default of payment of any of the instalments, the defendants might enter and carry away the boiler. E. then mortgaged his interest in the land by underlease to the plaintiff, who had no notice of the agreement, and who allowed E. to remain in possession. The defendants afterwards supplied the boiler, which was fixed in the land. One of the instalments not being paid, the defendants entered and carried the boiler away. In an action by the plaintiff against the defendants for removing the boiler:—*Held* (affirming the decision of Wright, J.), that the plaintiff, having allowed the mortgagor to remain in possession, must be taken to have acquiesced in his making agreements for fixing and removing fixtures for the purposes of his trade, and that he could not claim the boiler as against the defendants.—*Sanders* v. *Davis* (15 Q. B. D. 218) and *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* ([1892] 1 Ch. 415) followed. GOUGH *v.* WOOD & Co. - - - - - **C. A. 713**

—— Interest on mortgage—Transfer of estates of mortgagor and mortgagee—Claim to prove for arrears of interest—Proof—Bankruptcy - - - - **11**
See BANKRUPTCY. 12.

MUNICIPAL CORPORATION—*Election of Mayor—Disqualification of Voters—Office of Profit—Candidate voting for Himself—Validity of Vote of disqualified Person—Interest in Lease—Letting for one Day—Right of Chairman to Vote—Casting Vote—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 12, *sub-s.* 2 (*a*); *s.* 15, *sub-s.* 4; *s.* 22, *sub-s.* 3; s. 42, *sub-s.* 1; *s.* 61, *sub-s.* 4.] Where by the resolution of a town council under s. 15, sub-s. 4, of the Municipal Corporations Act, 1882, a salary is attached to the office of mayor, a candidate for that office is disqualified under s. 22, sub-s. 3, from voting for himself, as he has a pecuniary interest in the matter.—Sect. 42, sub-s. 1, which renders valid the acts of a disqualified person while acting in a corporate office, does not prevent an inquiry on an election petition into the validity of a vote given by such person in virtue of such office.—Sect. 12, sub-s. 2 (*a*), which provides that a person shall not be disqualified from being a councillor by reason only of his having an interest in any lease in which the council is also interested, refers as much to a letting for one day as to a lease for a longer period.—Sect. 61, sub-s. 4, which provides that in case of equality of votes at the election of mayor "the chairman, although not entitled to vote in the first instance, shall have the casting vote," does not prevent the chairman from voting in the first instance, unless he is otherwise disqualified. NELL *v.* LONGBOTTOM [767

NEGLIGENCE—*Cab—Negligence of Driver—Liability of Registered Proprietor—London Hackney Carriages Act*, 1843 (6 & 7 *Vict. c.* 86).] Under the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), so far as the public is concerned, the registered proprietor of a hackney carriage is responsible for the acts of the driver whilst he is plying for hire, as if the relationship of master and servant existed between them, even though it does not in fact exist.—*King* v. *Spurr* (8 Q. B. D. 104) must be taken to have been overruled by *King* v. *London Improved Cab Co.* (23 Q. B. D. 281). KEEN *v.* HENRY - **C. A. 292**

NEGLIGENCE—*continued.*
—— Bailment—Restaurant keeper—Coat of customer - - - - **92**
See BAILMENT.

—— Highway—Nuisance—Cover of manhole in sewer—Local authority—Liability **332**
See LOCAL GOVERNMENT.

NEW TRIAL—Obstruction of highway—Conviction - - - - **823**
See CRIMINAL LAW. 4.

NUISANCE—*Reversioner, Liability of—Landlord and Tenant—Weekly Tenancy—Necessity for Notice to Determine—Injury caused by Defective Repair of demised Premises.*] The plaintiff was injured through a defect in the condition of a coal-plate in the pavement in front of a house let by the defendant on a weekly tenancy. The evidence shewed that the defect had existed for some months before the accident, but was conflicting as to whether the accident was owing to the neglect of the tenant to secure the plate properly, or to the defective state of the flagstone, or to the presence of clay, which prevented the plate from fitting.—The county court judge directed a verdict for the plaintiff, the amount of damages being agreed.—On appeal:—*Held*, that a weekly tenancy does not determine without notice at the end of each week, but some notice is required to determine such a tenancy, that the continuance of the tenant's occupation on the expiration of each week did not render the defendant liable for defects then existing, as if there had been a re-letting, that it was a question for the jury whether the injury was caused by the negligence of the tenant, or by a structural defect existing at the date of the original letting, for which the defendant would be liable, and there must be a new trial.—*Sandford* v. *Clarke* (21 Q. B. D. 398) discussed, and the grounds of the decision disapproved. BOWEN *v.* ANDERSON - - **164**

—— Highway—Cover of manhole in sewer—Local authority—Liability - **332**
See LOCAL GOVERNMENT.

—— Navigable river—Foreshore—Inability to find person creating nuisance—Liability of owner of foreshore to abate - **647**
See RIVER.

OFFENCES—Person—Offences against—Carnal knowledge of girl between thirteen and sixteen—Aiding and abetting misdemeanour—Inciting to commit offence
See CRIMINAL LAW. 5. [710

PARLIAMENT—*Borough Vote—Registration of Voters—Description of Qualification—Amendment of Claim—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-ss.* 2, 13.] The appellant claimed to have his name inserted in Division One of the list of voters as a

PARLIAMENT—*continued.*

parliamentary voter and burgess. The claim stated the nature of the qualification, in the third column, as "dwelling-house, successive," and described the qualifying property, in the fourth column, as two houses. It appeared that the appellant had lived in one only of such houses throughout the qualifying period:—*Held*, that the qualification in respect of the occupation of one house is a different qualification from that in respect of the occupation of two houses in succession, and that the revising barrister had no power to amend the claim by omitting the word "successive" in the third, and the house in which the appellant had not lived in the fourth, column. *Foskett* v. *Kaufman* (16 Q. B. D. 279) followed. HURCUM *v.* HILLEARY - - C. A. 579

2. —— *Borough Vote—Registration—Occupation of Rateable Dwelling-house not included in Rate—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-ss.* 2, 3; *s.* 26—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 19—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 9, *sub-s.* 2 (*d*); *s.* 32—*Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 9, *sub-s.* 9.] The inhabitant occupier of a dwelling-house, which, though rateable, has not been rated to a poor-rate made during the qualifying period, and in respect of which such rate has not been paid, is not entitled to either the parliamentary or the municipal franchise. PALMER *v.* WADE. WADE *v.* PALMER - - 268

3. —— *Borough Vote — Registration—Service of Notice of Objection—"Ordinary course of Post"—6 & 7 Vict. c.* 18, *ss.* 17, 100.] Notices of objection to borough voters under 6 & 7 Vict. c. 18, s. 17, were posted addressed to barracks in which the voters resided. According to the military and postal regulations, letters thus addressed are not delivered at the barracks by postmen, but are taken from the post-office to the barracks by orderlies. The notices were brought to the barracks by an orderly on August 19, when the voters were absent in camp, and were by mistake not sent on till August 21. If the voters had been in the barracks, they would have received the notices on August 19; but for the mistake, they would have received them at the camp on August 20, the last day for giving notice of objection:—*Held*, on the authority of *Childs* v. *Cox* (20 Q. B. D. 290), that the facts did not shew that there was any "ordinary course of post" to the barracks within the meaning of s. 100, and that there was therefore no evidence of the service of the notices on or before August 20.—*Semble* (per Lord Coleridge, C.J., and Lawrance and Collins, JJ.), that *Childs* v. *Cox* (20 Q. B. D. 290) was wrongly decided. KEMP *v.* WANKLYN - - - 265

4. —— *Borough Vote—Registration — Service of Notice of Objection—Production of Stamped Duplicate—"Ordinary course of Post"—6 & 7 Vict. c.* 18, *ss.* 17, 100.] Notices of objection to borough voters under 6 & 7 Vict. c. 18, s. 17, were posted in conformity with the provisions of s. 100, addressed to barracks in which the voters resided. According to the military and postal regulations, letters thus addressed are not delivered at the barracks by postmen, but are taken from the post-office to the barracks by orderlies. The notices were

PARLIAMENT—*continued.*

brought from the post-office to the barracks by an orderly on August 19, when the voters were absent in camp, and were by mistake not sent on till August 21:—*Held*, that the expression "ordinary course of post," in 6 & 7 Vict. c. 18, s. 100, means the general course of post with regard to the delivery of letters to persons resident in the district; and, as in such course of post the notices would have been delivered by the post-office at the barracks on or before August 20, but for the special arrangement made with regard to persons living in barracks, due service of the notices of objection was proved by the production of duplicate notices stamped by the post-office under s. 100.—*Childs* v. *Cox* (20 Q. B. D. 290) overruled. KEMP *v.* WANKLYN - - - C. A. 583

5. —— *Petition—Refusal of Member to Present Petition—Right of Action.*] There is no right in a person desirous of petitioning the House of Commons to compel any particular member of the House to present such petition, and no action will lie against any member of the House for refusing to present such a petition. CHAFFERS *v.* GOLDSMID - - - - - 186

PARTNER—Infant—Receiving order — Partnership firm - - - - - 1
See BANKRUPTCY.

PARTNERSHIP—Action against firm—Writ of summons—Foreign partnership - 784
See PRACTICE. 8.

—— Action against partners in name of firm—Dissolution of partnership before action commenced—Service of writ on retired partner—Judgment against firm—Execution - - - - - 792
See PRACTICE. 7.

—— Bankruptcy — Practice — Consolidation of petitions - - - - 442
See BANKRUPTCY. 9.

—— Bankruptcy—Proof by solvent partner for separate debt against separate estate of insolvent partner - - - 638
See BANKRUPTCY. 8.

—— Bankruptcy of one partner—Bankrupt continuing in business—After-acquired property—Title of trustee in bankruptcy
See BANKRUPTCY. 6. [425

PAYMENT—Auctioneer—Authority—Receipt of payment by cheque instead of cash 272
See PRINCIPAL AND AGENT.

PHARMACY ACTS—*Sale of Poison — Medicine containing Poison—Infinitesimally small Quantity*—31 & 32 *Vict. c.* 121, *s.* 15.] In order to render a person liable, under the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15, for selling poison without being a chemist within the meaning of the Act, it is not sufficient to prove the sale of a compound containing an infinitesimally small quantity of a poison as defined by the Act. PHARMACEUTICAL SOCIETY *v.* DELVE - - - 71

POISON—Sale of—Medicine containing poison 71
See PHARMACY ACTS.

POOR-RATE—*Appeal—Valuation List—Approval of by Committee before expiration of Statutory Period—Union Assessment Committee Act*, 1862

POOR-RATE—*continued.*

(25 & 26 *Vict. c.* 103), *s.* 18—*Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.] The effect of s. 18 of the Union Assessment Committee Act, 1862, is to render void any valuation list which has been approved by the assessment committee before the expiration of twenty-eight days after public notice of the deposit of such list by the overseers, and also any rate made in conformity with such list, and that effect is not taken away by s. 1 of the Union Assessment Committee Amendment Act, 1864. ASSESSMENT COMMITTEE OF REIGATE UNION AND CHURCHWARDENS, &C., OF BETCHWORTH *v.* SOUTH-EASTERN RAILWAY COMPANY - 411

2. —— *Occupation — Exclusive Use — Gas Mains.*] By s. 43 of the Southport Improvement Act, 1871 (34 & 35 Vict. c. cxl.), the local board of Birkdale had the exclusive right of laying down gas mains and pipes within that township, and were obliged to keep all present and future gas mains and public lamps in good repair, and were to afford the corporation of Southport (who were the owners and occupiers of gas-works, and were empowered by statute to supply gas in the township of Birkdale) the use of the same mains for the supply of gas for public and private purposes within that township, in consideration of certain payments to be made by the corporation to the local board for every thousand cubic feet of gas supplied to private consumers. The local board had laid mains within the township, and had kept them in repair, and had afforded the corporation the use of the same for the supply of gas. The mains were not used for any purpose other than the supply of gas by the corporation. The corporation laid the service pipes from the mains to the premises of private consumers at the cost of the latter, kept the service pipes in repair, and charged and collected all gas rents: —*Held*, affirming the decision of the Queen's Bench Division ([1893] 2 Q. B. 468), that the corporation had only a right to the use of the mains for the sole purpose of the supply of gas, and had no exclusive occupation of the mains so as to render them liable to be rated in respect of them. MAYOR, &C., OF SOUTHPORT *v.* ORMSKIRK UNION ASSESSMENT COMMITTEE - C. A. 196

3. —— *Tithe Rent-charge—Rating of Owner —Arrears of Rates due before passing of Tithe Act*, 1891 — *Deduction from Tithe Rent-charge accruing after passing of Act—Retrospective effect of Statute—Repeal of Statute—Saving of existing Rights and Liabilities—Tithe Act*, 1891 (54 & 55 *Vict. c.* 8), *s.* 6—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 38.] By s. 6 of the Tithe Act, 1891, "any rate to which tithe rent-charge is subject shall be assessed on and may be recovered from the owner of the tithe rent-charge, ... and so much of any Act as authorizes any rate on tithe rent-charge to be assessed on or recovered from the occupier of any lands out of which the tithe rent-charge issues is hereby repealed."—At the date of the passing of the Act rates upon a tithe rent-charge were due and in arrear, owing to the omission of the overseers to demand payment thereof from the occupiers of the land out of which the tithe rent-charge issued. The tithe rent-charge for the period in respect of

POOR-RATE—*continued.*

which the rates in arrear were due had been paid to the tithe-owner in full. After the passing of the Act, the overseers, purporting to act under s. 8 of the Tithe Act of 1837, demanded payment of the arrears of rates from the occupiers of the land, who paid them, and were allowed the amount thereof by their landlord, the owner of the land, out of the half-year's rent next becoming due. Subsequently thereto a half-year's tithe rent-charge became payable by the landowner. The landowner claimed to deduct therefrom the amount which he had allowed to the occupiers out of their rent in respect of the arrears of rates paid by them:—*Held*, by Lord Esher, M.R., and Lopes, L.J. (Kay, L.J., dissenting), that, having regard to the provisions of s. 6 of the Act of 1891, the payment of the arrears of rates by the occupiers was a voluntary payment, and that they were not entitled to deduct the amount so paid from their rent; that consequently the landowner was not entitled to deduct the amount which he had allowed to the occupiers from the tithe rent-charge due by him:—*Held*, by Kay, L.J., on the construction of s. 6, and at any rate by virtue of s. 38 of the Interpretation Act, 1889, that, as regarded arrears of rates due at the time of the passing of the Act of 1891, the former machinery was still in force, and that consequently the payment by the occupiers was not a voluntary one, and the landowner was entitled to deduct the amount which he had allowed to them out of their rent from the tithe rent-charge due by him to the tithe-owner. IN RE TITHE ACT, 1891. ROBERTS *v.* POTTS. JONES *v.* COOKE C. A. 213

—— Appeal—Justices—Disqualification 416
See JUSTICES.

PRACTICE—*Action for Recovery of Land—Judgment under Order* XIV., *r.* 1—*Specially indorsed Writ—Order* III., *r.* 6—*Landlord and Tenant—Forfeiture — Notice to Quit.*] In a lease of a dwelling-house for a term of seven years there was a provision that, if any rent were in arrear for a certain time, the landlord might either forthwith determine the term by notice to quit in writing, or immediately re-enter. Rent being in arrear for the specified period, the landlord gave the tenant notice to quit, and brought an action to recover the premises:—*Held*, that the claim to recover the premises being in substance based on a forfeiture, the case did not come within the words of Order III., r. 6 (F); and therefore the writ could not be specially indorsed with such claim under that rule, and the plaintiff could not obtain leave to enter judgment for recovery of the land under Order XIV. ARDEN *v.* BOYCE - - - - C. A. 796

2. —— *Costs—Costs of former Trial to abide "result" of new Trial—Recovery of One Farthing Damages in Action of Tort—Refusal of Certificate for Costs.*] In an action of false imprisonment the Court of Appeal, in ordering a new trial, directed that the costs of the former trial should abide the result of the new trial. At the second trial the jury gave a verdict for the plaintiff, one farthing damages, and the judge refused to give the plaintiff a certificate for costs:—*Held*, that the "result of the new trial" meant the result of that trial as to costs, and therefore the plaintiff

PRACTICE—*continued.*

was not entitled to any costs of the first trial. BROTHERTON *v.* METROPOLITAN DISTRICT RAILWAY JOINT COMMITTEE - - C. A. 666

3. —— *Equitable Execution — Receiver — Executor of Judgment Creditor—"Parties entitled to Execution"—Order XLII., rr.* 8, 23.] The appointment of a receiver of the property or interest of a judgment debtor is not "execution" within the meaning of Order XLII., rr. 8, 23. The executors of a deceased judgment creditor are, therefore, not entitled to obtain an order for the appointment of a receiver of the judgment debtor's property, or an injunction against his dealing with it. NORBURN *v.* NORBURN - 448

4. —— *Execution—Receiver, Appointment of —"Equitable Execution"—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.] The Judicature Act, 1873, s. 25, sub-s. 8, does not give jurisdiction to appoint a receiver by way of "equitable execution" in cases where prior to that Act no court had such jurisdiction.—In order to justify the making of an order for the appointment of a receiver at the instance of a judgment creditor, the circumstances of the case must be such as would have enabled the Court of Chancery to make such an order before the Judicature Act.—The Court therefore has no jurisdiction to appoint a receiver merely because, under the circumstances of the case, it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution. HARRIS *v.* BEAUCHAMP BROTHERS - C. A. 801

5. —— *Injunction — Breach of Contract — Theatrical Engagement—Contract to Act with a Company for a certain Period—Stipulation against Acting elsewhere.*] Defendant, an actor, agreed with plaintiff, a theatrical manager, to act and to understudy as a member of plaintiff's company on tour in America for twenty-five weeks, or longer if required, but not more than forty weeks, subject to certain rules, by one of which no member of the company was allowed to act at any other theatre without permission. Shortly after the beginning of the tour plaintiff produced a play in America, in which defendant was not given a part to act, but was called on to understudy. A week later defendant wrote asking plaintiff to cancel the engagement, and this being refused defendant returned to England, and entered into an engagement and acted at a theatre in London. Defendant alleged in his affidavit that plaintiff had verbally promised that defendant should perform in certain parts, but had not kept such promise.—On an application for an injunction to restrain defendant from acting at any theatre other than where plaintiff's company played:—*Held*, that the negative stipulation against acting elsewhere could be enforced by injunction, that the alleged verbal promise could not, in the absence of any circumstances shewing want of good faith on plaintiff's part, be considered in construing the contract, that the allotting of parts to defendant was no part of the consideration, that plaintiff had not failed to carry out his part of the contract, and an injunction ought to be granted.—*Fechter* v. *Montgomery* (33 Beav. 22) distinguished. GRIMSTON *v.* CUNINGHAM - - - - - 125

PRACTICE—*continued.*

6. —— *Interpleader — Cause Proceeding in District Registry—Order XXXV., r.* 6.] The Judicature Rules confer no jurisdiction upon a district registrar of the High Court to make an interpleader order. HOOD & SONS *v.* YATES. DERRETT, CLAIMANT - - - - - 240

7. —— *Partners—Action against Partners in name of Firm—Dissolution of Partnership before Action commenced—Service of Writ on retired Partner—Judgment against Firm—Execution—Order XLVIII. A, rr.* 1, 3, 8.] Where an action is brought and judgment is recovered against copartners in the firm name, if one of the members has left the firm to the knowledge of the plaintiff before the commencement of the action, and does not appear to the writ in his own name or admit that he is, or has not been adjudged to be, a partner, the plaintiff—in order to be entitled to obtain leave to issue execution against such member, or to have the question of his liability tried, under rule 8 of Order XLVIII. A—must have served him with the writ in accordance with the proviso to rule 3. WIGRAM *v.* COX, SONS, BUCKLEY & Co. - - - - - 792

8. —— *Partnership Firm, Action against—Writ of Summons—Foreign Partnership—"Carrying on Business within the Jurisdiction"—Order XLVIII. A, rr.* 1, 3, 8.] Order XLVIII. A, rule 1, applies to all partnerships carrying on business within the jurisdiction:—Therefore, a firm which carries on business within the jurisdiction may be used in the firm name under that rule without leave, although it be a foreign or colonial firm, the members of which are resident out of the jurisdiction. WORCESTER CITY AND COUNTY BANKING COMPANY *v.* FIRBANK, PAULING & Co. [C. A. 784

9. —— *Prohibition — Rule Absolute without Pleadings—Costs—Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *ss.* 4, 5.] The right to grant prohibition not being a jurisdiction belonging exclusively to the Crown side of the Queen's Bench Division, the High Court, in making a rule absolute for a prohibition without pleadings, may make an order for costs. THE QUEEN *v.* JUSTICES OF THE COUNTY OF LONDON AND LONDON COUNTY COUNCIL - C. A. 453

10. —— *Sequestration—Recovery of Judgment —Order for Payment of Money within limited Time—Want of Jurisdiction—Order XLI., r.* 5; *Order XLII., rr.* 3, 6; *Order XLIII., r.* 6.] The plaintiffs, having recovered judgment against the defendant, a married woman, obtained from a master at chambers an order directing her to pay the amount recovered within ten days from the service of the order, and, in default of such payment, giving the plaintiffs leave to issue a writ of sequestration against her separate property:—*Held*, that the master had no jurisdiction to make such an order. HULBERT & CROWE *v.* CATHCART [244

11. —— *Writ indorsed for Liquidated Demand—Reduction of Amount by Payment—Judgment signed on Default of Appearance—Judgment for Amount actually due—Setting aside Judgment for larger Amount—Order XIII., r.* 3.] When a

PRACTICE—*continued.*
writ of summons is indorsed for a liquidated demand, which is reduced by payment after writ issued, judgment on default of appearance ought only to be entered for the amount actually due at the time when such judgment is entered, and the defendant has a right to have any judgment entered for a larger amount set aside, HUGHES *v.* JUSTIN - - - - C. A. 667

12. —— *Writ specially Indorsed—Application for Leave to enter final Judgment—Affidavit verifying Cause of Action, Sufficiency of—Action on Cheque.*] Upon an application under Order XIV., r. 1, for leave to enter final judgment upon a writ specially indorsed with a claim for the amount of a dishonoured cheque, the affidavit verifying the cause of action need not contain an allegation that notice of dishonour has been given to the drawer. MAY *v.* CHIDLEY - - 451

13. —— *Writ specially Indorsed—Omission in Copy served on Defendants—Sufficiency of Indorsement—Amendment of Pleading—Marking of Copy delivered to opposite Party—Order III., r. 6 (f); Order XXVIII., rr. 9, 10.*] In an action for the recovery of land by a landlord against tenants whose term had expired, the writ was specially indorsed under Order III., r. 6 (*f*), with a statement of the date of the lease, the length of the term and the mode of devolution of the lessee's interest upon the defendants; but in the copy of the writ served upon the defendants the length of the term did not appear:—*Held*, that the copy served upon the defendants gave them sufficient information to satisfy the requirements of Order III., r. 6 (*f*), and that they could not object that the writ was not specially indorsed within the meaning of that rule: *Held*, further, that the directions in Order XXVIII., r. 9, as to marking an amended indorsement or pleading with the dates of the order for amendment and of the amendment did not extend to the copy of the amended indorsement or pleading delivered to the opposite party under Order XXVIII., r. 10. HANMER *v.* CLIFTON - - - - - 238

—— County court—Default summons issued out of jurisdiction—Affidavit, form of 248
See COUNTY COURT. 6.

—— Indictment — New trial — Obstruction of highway - - - - 823
See CRIMINAL LAW. 4.

—— Libel — Interlocutory injunction pending trial — Exhibition of effigy whether libellous — Question for jury whether plaintiff consented to exhibition—Discretion - - - - 671
See DEFAMATION. 2.

—— Mayor's Court—Appeal to High Court—Security for costs - - - 236
See MAYOR'S COURT.

—— Solicitor — Undertaking — Enforcement — Terms of stay of execution—Payment of taxed costs—Solicitor to repay costs if appeal successful — Power of Court to enforce undertaking in summary manner
See SOLICITOR. 4. [707

PRINCIPAL AND AGENT—*Authority—Payment to Agent—Payment by Cheque instead of Cash—Auctioneer.*] The plaintiff was owner of a house which was let for a term of years subject to a proviso that the lessee should not assign the premises without the plaintiff's written consent. The lessee agreed to assign the term to a purchaser, and applied to the plaintiff for his licence. The plaintiff put the matter into the hands of the defendant, who was an auctioneer and house agent, and gave him a written licence for the lessee to assign, but instructed him not to part with the licence till the lessee had paid the last quarter's rent, which was in arrear. The defendant accordingly met the lessee and the purchaser by appointment to complete the transaction, and accepted from the lessee a cheque drawn to the defendant's order for the amount of the rent in arrear, together with a small sum for the defendant's charges. The defendant then gave up the licence, and the purchase was completed. The lessee's cheque having been dishonoured, the plaintiff brought an action against the defendant for negligence, in departing from his instructions by giving up the licence without receiving the rent in cash:—*Held*, that the defendant was liable, and that the measure of damages for which he was liable was the full amount of the arrears of rent.—*Bridges* v. *Garrett* (Law Rep. 5 C. P. 451) distinguished. PAPÈ *v.* WESTACOTT C. A. 272

—— Estoppel—Conduct—Sale by agent - 88
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PRINCIPAL AND SURETY—Insurance of securities—Surety, Discharge of - 54
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PROHIBITION—*County Court—Absence of Jurisdiction apparent on face of Proceedings—Discretion—Acquiescence in exercise of Jurisdiction—Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 24.] Where total absence of jurisdiction appears on the face of the proceedings in an inferior court, the Court is bound to issue a prohibition, although the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior court.—By the terms of the lease of a farm it was agreed that upon the determination of the lease certain matters not within the Agricultural Holdings (England) Act, 1883, should be the subject of compensation to the tenant, and that the procedure contained in ss. 7 to 28 of that Act should apply to such matters as well as to any claim under the Act. Upon the determination of the lease, the tenant's claim for compensation was referred to arbitration in the manner provided by the Act; and an award was made, which on the face of it shewed that compensation had been awarded to him for matters not within the Act. A county court judge made an order to enforce the award by execution as on an ordinary county court judgment under s. 24 of the Agricultural Holdings Act, 1883:—*Held*, upon an application by the lessor for a prohibition to the county court against proceeding upon such order, that the writ must issue, notwithstanding the agreement contained in the lease, and the fact that the lessor had by his conduct acquiesced in the exercise of jurisdiction by the county court. FARQUHARSON *v.* MORGAN - C. A. 552

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RAILWAY—*Cloak Room—Lien for Charges—Goods deposited by Bailee.*] The bailee of a sewing machine under a hire and purchase agreement deposited it at the cloak-room of a railway station. After the determination of the bailment, the owners of the sewing machine sought to recover it from the railway company:—*Held*, that the railway company had a lien on the sewing machine against the owners for the payment of the cloak-room charges. SINGER MANUFACTURING COMPANY *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY - - - 833

2. —— *Common Carrier—Liability—Loss of Goods by Theft of Company's Servants—Special Contract, Validity of*—11 *Geo.* 4 *and* 1 *Wm.* 4, *c.* 68, *ss.* 1, 6, 8—*Railway and Canal Traffic Act* (17 *&* 18 *Vict. c.* 31), *s.* 7.] Sect. 7 of The Railway and Canal Traffic Act enacts that a railway company shall be liable, in the absence of a signed and reasonable contract for exemption, for the loss of any goods in the receiving, forwarding, or delivering thereof "occasioned by the neglect or default of such company or its servants":—*Held*, that a loss of goods by the theft of a railway company's servant, without negligence on the part of the company, was not a loss "occasioned by the neglect or default of the company or its servants" within the meaning of s. 7, and therefore that the company could at common law protect themselves against liability by a special contract, although such contract was not reasonable within the requirement of the Act. SHAW *v.* GREAT WESTERN RAILWAY COMPANY - 373

3. —— *Compensation—Damage from working of Railway—Enlarging Ventilating Shaft—Damage from Construction—Railway Clauses Consolidation Act* (8 *&* 9 *Vict. c.* 20), *s.* 16.] The defendants, a railway company, were authorized by their special Act (which incorporated the Lands Clauses and Railways Clauses Acts) to construct an underground railway. They accordingly constructed part of the railway in a tunnel, and, having purchased a piece of ground at the back of a dwelling-house, carried the tunnel through such ground and made an aperture in the ground for the purpose of ventilating the tunnel. Some years afterwards the plaintiff

RAILWAY—*continued.*

became lessee of the house, and during his tenancy the defendants, with a view to the better ventilation of their line, enlarged the aperture, the effect of which was that the quantity of smoke, steam, and foul air coming from the railway to the plaintiff's house was much increased, and the house materially depreciated in value:—*Held*, that, whether the alteration was made by the defendants in the exercise of their rights as owners of the land or under the powers conferred by s. 16 of the Railways Clauses Act, the plaintiff, according to the principle of *Hammersmith Ry. Co.* v. *Brand* (Law Rep. 4 H. L. 171), had no right to compensation, for the alteration would cause no damage to him if the line was not used, the damage arising, not from the construction, but from the working of the railway. ATTORNEY GENERAL AND HARE *v.* METROPOLITAN RAILWAY COMPANY - - - - C. A. 384

4. —— *Construction of Special Act—Enactment as to Rate at which one Company shall forward Traffic of Another—Duty created towards other Company, not towards the Public.*] Where by a section in the special Act of railway company A., to whom power was given to effect a junction with the line of railway company B., it was provided that the latter company should charge for traffic on their line destined for or coming from the line of company A. at a rate per mile not greater than the lowest rate charged by them for like traffic to or from certain places on their line, such provision appearing from the context and the circumstances to be intended by the legislature solely for the protection of the interests of company A. as against company B.:—*Held*, that such provision created no duty other than to company A., and therefore colliery owners, for whom company B. had carried coal on their line destined for the line of company A., could not set up, by way of defence to an action for charges made by company B. in respect of such carriage which were within the maximum rate authorized by the Acts of that company, that such charges were in excess of the rate mentioned in the above-mentioned provision. TAFF VALE RAILWAY COMPANY *v.* DAVIS & SONS - C. A. 43

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REVENUE—*Stamp—Conveyance on Sale—Amalgamation of Railway Companies—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39)—*Great Western Railway*

REVENUE—*continued.*

Act, 1892 (55 & 56 *Vict. c.* CCXXXIII.).] By the Great Western Railway Act, 1892, it was enacted that the undertaking of two other railway companies should be amalgamated with and form part of the undertaking of the Great Western Railway Company, the amalgamated companies being dissolved as from the date of the amalgamation. From that date the shareholders in one of the amalgamated companies were, in lieu of and exchange for their shares, to become holders of guaranteed stock of the Great Western Company in certain specified proportions, the capital of the latter company being increased by the amount necessary to give effect to such provision. In the case of the other company the consideration for the amalgamation was the payment by the Great Western Company of the principal and interest of certain outstanding debentures, the share capital of that company being already held by the Great Western Company. A copy of the Act was to be chargeable with the same stamp duty as would have been chargeable had the transaction effected by the Act been effected by an executed instrument in writing:—*Held*, affirming the decision of the Queen's Bench Division, that the transaction by which the amalgamation was effected was in substance a transfer on sale, and that the copy of the Act was therefore properly chargeable as an executed instrument under the head "Conveyance or transfer on sale" in the first schedule to the Stamp Act, 1891, with ad valorem duty in respect of the value of the stock issued to the shareholders of the first, and with ad valorem duty in respect of the value of the outstanding debentures of the second, of the amalgamated companies. GREAT WESTERN RAILWAY COMPANY *v.* COMMISSIONERS OF INLAND REVENUE - - - - **C. A. 507**

2. —— *Stamp—Conveyance on Sale—Conveyance by Eight Partners to a Company consisting only of Themselves—Consideration—Ad Valorem Stamp—Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *ss.* 70, 71.] By deed between the eight partners composing a firm of the first eight parts, and a limited company of the ninth part, it was recited that the partners were desirous that their business should be reconstructed as a limited company, and had agreed that the whole of the undertaking, property, and liabilities of the firm should be transferred to a company, to be formed of all the partners in the firm exclusively, for the purpose of taking over the same; and that there should be allotted amongst the partners, in proportion to their shares in the partnership, the whole of the shares in the company. The deed then recited that such a company had been registered (being that party to the deed), and that all its shares were taken and held by the partners in specified proportions; and it was thereby witnessed that, "in pursuance of the said arrangement, and for the purpose of giving effect to the said scheme, and of vesting the real estate of the partnership in the company," the eight partners conveyed and assigned to the company all the real estate and trade-marks of the partnership:—*Held*, that the deed was a transfer of property from individuals to a corporation in consideration of "stocks or securities" within the meaning of s. 71 of the

REVENUE—*continued.*

Stamp Act, 1870 (33 & 34 Vict. c. 97; see now 54 & 55 Vict. c. 39, s. 55), and accordingly was a "conveyance on sale" chargeable with an ad valorem duty within the schedule to the Act; and was none the less so because the eight partners who conveyed the property were also the individuals who constituted the corporation. JOHN FOSTER & SONS *v.* COMMISSIONERS OF INLAND REVENUE - - - - **C. A. 516**

RIVER — *Nuisance on Foreshore of Navigable River—Inability to find Person causing Nuisance—Liability of Owner of Foreshore to abate—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 4, *sub-ss.* 1. 3 (*b*).] By s. 4, sub-s. 1, of the Public Health (London) Act, 1891, the sanitary authority, if satisfied of the existence of a nuisance liable to be dealt with summarily under that Act, are to serve a notice requiring its abatement on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises; sub-s. 3 (*b*) contains a proviso that where the person causing the nuisance cannot be found, and it is clear that it does not arise or continue by the act, default, or sufferance of the occupier or owner of the premises, the sanitary authority may themselves abate it.—The appellants were a public body having certain jurisdiction and powers over the River Thames, the bed and soil whereof and of the shores within the flux and reflux of the tides were vested in them by statute. The Acts by which their duties were regulated gave them various powers for the improvement of the navigation of the river, but gave them no power of scavenging or removing nuisances in the portion of the river hereafter referred to, and their power of raising funds, and the application of the funds when raised, were strictly limited by statute, and did not include a power of raising money for the sanitary improvement of such portion of the river. A nuisance injurious and dangerous to health existed between high and low water-marks in a tidal creek running inland about 400 or 500 feet from the line of the river; it consisted of an accumulation of foul mud, which was largely composed of decomposing organic matter, and was chiefly derived from matter held in suspension in the water or floating on its surface and left when the tide receded; it was impossible to fix upon any person or persons as having caused the accumulation. An order having been made upon the appellants as owners of the premises upon which the nuisance existed for its abatement:—*Held*, that s. 4, sub-s. 1, must be read with the proviso in sub-s. 3 (*b*); that where the person causing the nuisance could not be found, the liability of the owner of the premises to abate it only arose where it was shewn that it continued by his act, default, or sufferance, and that the order upon the appellants was therefore wrongly made:—*Held*, further, that under their Acts of Parliament the appellants were owners of the soil and foreshore of the river for certain specified purposes only, and were not owners for the purposes of s. 4 of the Public Health (London) Act, 1891. CONSERVATORS OF RIVER THAMES *v.* PORT SANITARY AUTHORITY OF PORT OF LONDON **647**

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SHERIFF—*Execution for more than 20l.—Sale by Sheriff by Private Contract — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 145, *Effect of.*] Where a sheriff under an execution for a sum exceeding 20*l.* sells the goods of a debtor by private contract with the consent of the debtor but without the leave of the Court, such sale, although in breach of the provisions of s. 145 of the Bankruptcy Act, 1883, is, until set aside by the Court, valid as against a subsequent execution creditor. CRAWSHAW *v.* HARRISON. FRASER, CLAIMANT - - - - - 79

SHIP—*Bill of Lading—Freight—Liability from Receipt of Goods under Bill of Lading—Consignee —Lien—Warehousing Cargo—Deposit—Delivery of Goods—"Legal Proceedings"—"Owner of Goods"—Merchant Shipping Acts Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *ss.* 66–72.] By the Merchant Shipping Act, 1862, ss. 66–68, a

SHIP—*continued.*
shipowner is at liberty to land goods imported in his ship from foreign parts upon their owner (which includes any person entitled to the possession) failing to take delivery, and may place the goods in the custody of a warehouse owner, subject to a lien for freight. By s. 70, the owner of the goods may deposit with the warehouse owner a sum of money equal to the amount claimed by the shipowner, and thereupon the lien shall be discharged, but without prejudice to any other remedy which the shipowner may have for the recovery of freight. By ss. 71 and 72, the sum deposited is to be paid to the shipowner, if there is no dispute between the shipowner and the owner of the goods as to the amount properly payable for the freight; and in the event of any such dispute the shipowner is to be paid so much of the deposit as the owner of the goods admits to be due, and the balance is to be returned to the owner of the goods unless the shipowner takes proceedings to recover it:—*Held*, by the majority of the Court of Appeal (Lindley and A. L. Smith, L.JJ., Davey, L.J., dissenting), that the deposit under the Act is not equivalent to, but only a security for, the payment of freight; and accordingly that the above sections do not affect the liability to freight of the consignee of goods named in a bill of lading, but without property therein, which liability may otherwise be inferred from his receipt of the goods under such bill of lading.—Where, therefore, the consignee (not being the owner) of goods under a bill of lading made a deposit under the Act equivalent to the full amount of freight, accompanied by a notice to retain the deposit pending instructions, and accordingly had the goods delivered to him:—*Held*, by Lindley and A. L. Smith, L.JJ. (Davey, L.J., dissenting), that the shipowner, notwithstanding such deposit, had an independent right of action against the consignee for the full amount of the freight. FURNESS, WITHY & COMPANY *v.* W. N. WHITE & COMPANY [C. A. 483

2. —— *Charterparty—Default in Loading a Full Cargo—Damages—Freight earned by Shipowner.*] The defendants chartered the plaintiffs' ship for the carriage of a full cargo of jute at 1*l.* 17*s.* 6*d.* per ton. By the charterparty, which contained the usual exception of "fire," it was stipulated that the captain should sign bills of lading at any rate of freight without prejudice to the charterparty or to the owner's lien, provided that the bill of lading freight in the aggregate should fully cover the freight due under the charterparty (5600*l.*). The defendants shipped 1519 tons under bills of lading, making freight payable at 1*l.* 5*s.* per ton. A fire broke out, which destroyed 1000 tons of the goods so shipped, and delayed the sailing of the ship. The defendants refused to load any more goods, upon which the plaintiffs filled up the ship with goods—some at 1*l.* 5*s.* per ton, some at a lower rate. In an action by the plaintiffs for breach of the charterparty, in not loading a full cargo:—*Held*, affirming the decision of Pollock, B., that the space occupied by the goods destroyed by fire was taken out of the charterparty, the defendants not being liable to pay freight in respect of such goods, nor

SHIP—*continued.*

bound nor entitled to ship fresh cargo to fill up the space which had been occupied by them, and that the freight which the plaintiffs received from other persons for goods carried in such space belonged to the plaintiffs, and ought not to be taken into account in reduction of the damages recoverable from the defendants:—*Held*, further, that the fire only absolved the defendants from payment of the freight which would have been payable on the goods destroyed by fire according to the bills of lading, and that after the fire the total amount of freight for which the defendants were liable was 5600*l.*, less 1*l.* 5*s.* per ton, on the 1000 tons destroyed by fire, not 5600*l.*, less the charter freight of 1*l.* 17*s.* 6*d.* per ton, on such 1000 tons. AITKEN, LILBURN & Co. *v.* ERNSTHAUSEN & Co. - - - C. A. 773

3. —— *Charterparty—Lump Freight—Cesser Clause—Charterer's Liability to Cease on Cargo being Loaded—Bill of Lading Freight not equal to Lump Freight — Absence of Lien for Full Freight, Effect of.*] By a charterparty, by which a ship was chartered at a lump freight for carriage of a cargo of oats from New Zealand to London, it was provided that the charterers might recharter the ship at any rate of freight without prejudice to the charterparty, the captain to sign bills of lading according to the custom of the port at the current or any rate of freight required without prejudice to the charterparty. The charterparty contained a clause by which the liabilities of the charterers were "to cease on the vessel being loaded, the master and owners having a lien on the cargo for all freight and demurrage under this charterparty." The charterers rechartered the ship. Under the subcharter a cargo of oats was shipped, and a bill of lading given, by which freight was payable in London at a certain rate per ton on the weight of the cargo as delivered. By reason of a diminution in weight of the cargo during the voyage, the amount of the bill of lading freight, for which the shipowner had a lien, did not wholly cover the amount due for lump freight under the charterparty. The shipowner sued the charterers to recover the difference:—*Held*, on the authority of *Clink* v. *Radford* ([1891] 1 Q. B. 625), that the cesser clause only relieved the charterers from liability to the extent to which the shipowner had obtained a lien for the freight on the cargo, and, therefore, the charterers were liable. HANSEN *v.* HARROLD BROTHERS - C. A. 612

4. —— *Charterparty—Option of Charterer as to Port of Discharge—Unloading delayed by Strike at Port to which Vessel ordered.*] A charterparty, which contained an exception of any delay occasioned by strikes, provided that the vessel, when loaded with coal, should proceed to one of certain named places on the Thames, as ordered, and there unload. The charterers ordered her to proceed to R., one of such places. After the voyage commenced, and before the arrival of the vessel at the mouth of the Thames, the charterers became aware of a strike among the coal porters at R., which did not extend to the other places named in the charterparty. In consequence of the strike it was impossible for the vessel to unload at R. within the time allowed by the charterparty.—In an action by the shipowners for demurrage:—*Held*, affirming the judgment of Pollock, B., that there was no obligation upon the charterers to change the order for the vessel to proceed to R. on the strike coming to their knowledge; and that, the delay being covered by the exception, no demurrage was payable. BULMAN & DICKSON *v.* FENWICK & Co. - C. A. 179

5. —— *Charterparty—Restraints of Princes and Rulers—Demurrage—Customary Mode of Loading.*] The defendants chartered the plaintiffs' vessel to load a cargo of nitrate at Iquique in Chili, at the rate of 200 tons per working lay day, to be reckoned from the day the vessel was ready to receive cargo to the day of her despatch, "restraints of princes and rulers, political disturbances or impediments during the said voyage always mutually excepted." The charterparty gave the ship liberty to call at any ports in any order. There was at Iquique only storage for a small quantity of nitrate, and the customary mode of loading there was to send the nitrate down direct by rail from the mines to the port, and there put it on board ship as required.—When the plaintiffs' vessel arrived at Iquique, a civil war had broken out in Chili, and delay occurred in loading the vessel, in consequence of the railway from the mines to Iquique being in the hands of the troops, so that nitrate could not be sent down from the mines to the port. That state of things subsequently ceasing, the cargo was loaded and the vessel sailed upon her voyage. Being short of coal, which was very dear at Iquique, she put into another Chilian port for it. The Chilian government in power there demanded payment of export duties, such duties having already been paid to the de facto government in power at Iquique, and the ship was detained there for ten days in default of payment of such duties. An action having been brought by the plaintiffs for demurrage:—*Held*, that both the above-mentioned delays fell within the exception clause in the charterparty. SMITH & SERVICE *v.* ROSARIO NITRATE COMPANY - - C. A. 174

SOLICITOR—*Bill of Costs—Taxation—Agreement in Writing—Signature of—Payment—Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *s.* 4—6 & 7 *Vict. c.* 73, *s.* 41.] The solicitor for the plaintiff settled an action, in which the plaintiff had obtained judgment, but the defendants had appealed, on the terms of the payment by the defendants of 210*l.* damages and 120*l.* for his costs. He explained the terms of the settlement to the plaintiff, and paid the plaintiff 210*l.* The plaintiff then signed a document in the following terms: "Received from T" (the solicitor) "the sum of 210*l.*, being the amount of damages received on my behalf from the defendants, and, having regard to the fact that he has settled with them for a sum less than that to which he would have been entitled for costs, if they had been unsuccessful, I hereby agree to allow the sum paid by me to him on account of costs as an equivalent for the abatement he has made to the defendants." The sum thus paid amounted to 55*l.* 16*s.* The solicitor afterwards delivered to the plaintiff a cash account containing on the credit side 330*l.* and 55*l.* 16*s.*, in all 385*l.* 16*s.*, on

SOLICITOR—*continued.*
the debit side 210*l.*, and "amount of agreed costs" 175*l.* 16*s.*, i.e. 120*l.* and 55*l.* 16*s.*, in all 385*l.* 16*s.*: —*Held*, that the plaintiff was not entitled to an order for taxation, for the document constituted an agreement in writing between solicitor and client within the meaning of s. 4 of the Attorneys and Solicitors Act, 1870, and the transaction amounted to payment between solicitor and client within the meaning of s. 41 of 6 & 7 Vict. c. 73. —Dictum in *In re Lewis, Ex parte Munro* (1 Q. B. D. 724) disapproved. IN RE THOMPSON. EX PARTE BAYLIS - - - - 462

2. —— *Champerty and Maintenance—Bill of Costs—Taxation—Retainer of, and payment of Money to, Solicitor for an illegal Purpose—Right of Client to Taxation of Bill of Costs and Account of Money paid.*] Money was subscribed by strangers for the maintenance of litigation for the recovery of property, to be repaid out of the property if recovered. This money was intrusted to J., who, by the authority of the claimant, retained a solicitor to conduct the litigation on behalf of the claimant, and paid him large sums of money out of the funds subscribed. The litigation was unsuccessful. J. then took out a summons against the solicitor for delivery and taxation of his bill of costs and an account of the money paid to him:—*Held*, affirming the decision of the Divisional Court (Mathew and Collins, JJ.), that the solicitor could not resist the taxation or the account on the ground that the employment for which he was retained, and for which the money was paid, was illegal. IN RE THOMAS. JAQUESS *v.* THOMAS - - - C. A. 747

3. —— *Professional Misconduct — Solicitor borrowing Money from Client without Independent Advice—Disciplinary power of Court.*] The report of the Committee of the Incorporated Law Society having found that a solicitor was guilty of professional misconduct, in having accepted as a loan large sums of money from a client, who had just attained his majority:—*Held*, that it was a case for the exercise of the disciplinary powers of the Court. IN RE A SOLICITOR. EX PARTE INCORPORATED LAW SOCIETY - 254

4. —— *Undertaking—Enforcement—Terms of Stay of Execution—Payment of Taxed Costs—Solicitor to repay Costs if Appeal successful—Power of Court to enforce Undertaking in summary manner.*] Where an order is made for a stay of execution pending appeal, the applicant to pay the taxed costs of the successful party to his solicitor on his personal undertaking to repay them should the appeal be successful, the undertaking given by the solicitor may be enforced by the Court in a summary manner. SWYNY *v.* HARLAND - - - - C. A. 707

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Held, that where a house, to which water is supplied by a waterworks company, is unoccupied at the beginning of a quarter, and becomes occupied in the course of the quarter, the company are only entitled to demand under the above section so much of the quarter's rate as is proportional to the period during which the house is occupied, even though whilst the house was so unoccupied the company had no notice of the fact, and consequently continued the supply of water. EAST LONDON WATERWORKS COMPANY *v.* FOULKES [819

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